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OF THE SEVERAL STATES.

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CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

SMITH v. SOUTHERN PACIFIC RAILROAD COMPANY.
[146 Cal. 164, 79 Pac. 868.]

PUBLIC STREETS—Damage to Private Citizen by Construction of Railways in.—When a railway is constructed and maintained in front of one's land abutting on a public street, he may recover damages of the railroad company for such destruction and impairment of his rights and easements in the street caused by the railway as constitute damage peculiar to himself and independent of such as he sustains in common with the public. (p. 18.)

PUBLIC STREETS, Damages for Construction of Railway Where no Change of Grade Results.—The fact that a railroad constructed in a public street in front of one's premises is flush with the surface of the ground and does not cause any change of grade, nor compel him to go either up or down in going from his land to the street, does not show that he could not have suffered from its construction damage peculiar to himself and different from that sustained by the public, where such railroad is constructed and maintained so near his premises that teams cannot be hitched in front thereof. (p. 19.)

PUBLIC STREETS.—The Necessity for Constructing a Railroad in a Public Street Close to the Line of the Lands of a Private Proprietor does not relieve the railroad company from liability for such damages as may result to him from such construction and the subsequent maintenance of the road. (p. 19.)

Canfield & Starbuck, for the appellant.

Richards & Carrier, for the respondent.

¹⁰⁵ **McFARLAND, J.** This is an action to recover damages alleged to have been caused to certain land and premises of ¹⁰⁶ plaintiff by the construction and maintenance by defendant of a steam railroad along the public road or street upon which plaintiff's land abuts. The jury returned a verdict for plaintiff

in the sum of three hundred and fifty dollars, and a judgment was rendered accordingly. Defendant appeals from the judgment, and brings up the evidence and rulings of the court in a bill of exceptions.

The main facts are these: Wallace avenue is a public highway in Santa Barbara county. It runs through the town of Summerland, and that part of it which lies within the town constitutes the principal street of said town. Plaintiff owns lots in the town abutting on said highway or street and having a frontage thereon of one hundred feet. The street lies on the south side of plaintiff's lots. About June, 1891, defendant constructed, and since then has maintained, along said street a railroad track upon which it operates a steam railroad, having been granted the right of way therefor by the board of supervisors. A part of this railroad runs along the entire frontage of plaintiff's lots, upon which he has a dwelling-house and other buildings. The lots are on a level with the street, and the construction of the railroad does not change the grade of the street; the rails are flush with the surface of the street. The track in front of plaintiff's lots is constructed entirely on the north half of the street—the side next plaintiff's lots. It runs diagonally along the street at an angle to the front line of plaintiff's lots, and is nearer that line on the southwest corner of his lots than on the southeast corner. At the southwest corner the ends of the ties of the railroad are ten feet from plaintiff's line, and on the northeast corner between twelve and thirteen feet. The street is sixty feet wide. One of defendant's witnesses said: "I don't think it would be possible for a man crossing with a team up to Mr. Smith's place to hitch in front of his two western lots; opposite the eastern lots he might, but it might not be a desirable place to hitch, though." The amount of damage found by the jury was fully sustained by the evidence—provided such damage was not *damnum absque injuria*. There are some other facts in the case which are commented on by counsel, but in our opinion they are not important.

The general principle applicable to a case like the one at 167 bar is, that when a railroad is constructed and maintained along a highway in front of a man's land the latter may recover damages of the railroad company for such destruction or impairment of his rights and easements in the public highway caused by the railroad as constitute damage peculiar to himself and independent of such damage as he sustains in common with the public, but cannot recover damages for those general inconve-

niences which he is subject to in common with the public. In the case at bar the contention of appellant for a reversal seems to rest on the proposition that because the rails of the track were flush with the surface of the ground, and the construction of the railroad track did not cause any change of grade or compel respondent to go either up or down in getting from his land to the street, therefore, as a matter of law, respondent could not have suffered from its construction any damage peculiar to himself and different from that felt or sustained by the public. But we do not think that this proposition is maintainable. We cannot say that, as a matter of law, the construction of the railroad so near the line of respondent's lots as to cause him inconvenience, and obstacles spoken of by the witnesses above mentioned, as well as other obstacles to the enjoyment of said lots that could readily be suggested, does not cause damage peculiar to respondent and different from that suffered generally by the public. It is not a sufficient answer to say that it was necessary for appellant to build its track gradually across the street, and therefore to put part of it close to respondent's line. Whatever appellant's necessities were in the premises, if what it actually did caused special and peculiar damage to respondent, it is liable for such damage.

The judgment is affirmed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

The Construction and Operation of an ordinary commercial railroad in a public street is usually regarded as an additional servitude for which abutting owners are entitled to compensation: See the monographic note to Wright v. Austin, 101 Am. St. Rep. 110. See the extended notes to Mordhurst v. Ft. Wayne etc. Traction Co., 163 Ind. 268, post, p. 232; Sheehy v. Kansas City Ry. Co., 4 Am. St. Rep. 402.

LOS ANGELES RAILWAY COMPANY v. DAVIS.

[146 Cal. 179, 79 Pac. 865.]

PLEADING CORPORATE EXISTENCE — Demurrer. — The point that the plaintiff is not a corporation goes only to its capacity to maintain the action, and cannot be raised by general demurrer, but only by special demurrer, on the ground that the plaintiff has no capacity to sue, and not then, unless such want of capacity appears affirmatively on the face of the complaint. (pp. 20, 21.)

F. G. Hentig and T. N. Stewart, for the appellants.

Bicknell, Gibson & Trask, for the respondent.

¹⁸⁰ McFARLAND, J. This is an action to quiet title to certain land. Defendants demurred to the complaint upon the general ground that it does not state facts sufficient to constitute a cause of action—no other ground of demurrer being stated. The demurrer was overruled. Defendants then answered, denying plaintiff's title to the land, and setting up title in themselves. The court found for the plaintiff and rendered judgment accordingly. Defendants appealed from the judgment upon the judgment-roll.

The only point made by appellants for a reversal is, that the complaint does not contain an averment that plaintiff is a corporation. The fact as to this contention is, that while in the title of the case as it appears at the commencement of the complaint the plaintiff is designated as "a corporation," there is no averment in the body of the complaint of plaintiff's corporate existence. The court found that plaintiff was a corporation.

Waiving other questions discussed by counsel, we are satisfied that the point sought to be made by appellants is not raised by the general demurrer. The point that plaintiff was not a corporation goes only to its capacity to maintain an action, and not to the sufficiency of the facts averred to constitute the alleged cause of action; and therefore it could be raised by demurrer to the complaint only under subdivision 2 of section 430 of the Code of Civil Procedure, which provides as a cause of demurrer "that plaintiff has not legal capacity to sue"—and then only where said want of capacity "appears on the face" of the complaint. If it does not so appear, ¹⁸¹ the objection must be taken by answer pursuant to section 433.

There are some authorities which appear to support appellants' contention, and the principal one cited by them is *Miller v. Pine*

Min. Co., 3 Idaho, 493, 35 Am. St. Rep. 290, 31 Pac. 803, but in the notes to the case the author of the work, after expressing his disapproval of the doctrine announced therein, cites a multitude of cases holding the other way. We will notice only the first case cited by the author—Phoenix Bank v. Donnell, 40 N. Y. 410—because it has more than once been referred to and approved by this court. In that case there was no averment in the complaint that the plaintiff was a corporation, and it is not even called a corporation in the title, and the demurrer there was upon the ground that it appeared that “plaintiff has no legal capacity to sue,” and also upon the general ground that it did not state facts sufficient to constitute a cause of action. (Section 144 of the New York code is the same as section 430 of our code, and section 147 the same as our section 433.) The demurrer was overruled in the lower court and the judgment was affirmed in the court of appeals. As to the first ground of demurrer the court said: “All that the argument proves is, that the complaint does not show upon its face, affirmatively, that the plaintiff has capacity to sue. But to sustain the demurrer, the code requires that it should appear upon its face that it had not such capacity, which in no respect appears. For aught appearing upon the face of the complaint, the plaintiff may be a corporation entitled to sue as such. Section 147 provides that when any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer. This would seem to indicate the proper practice with sufficient clearness. If it appears upon the face of the complaint that a plaintiff suing as a corporation is not such in fact, a demurrer is the proper remedy of the defendant under section 144. If the complaint does not show that the plaintiff is not a corporation on its face, the objection that it is not such must be taken by answer under section 147. This would seem to render further discussion of the question unnecessary.” With respect to the second ground of demurrer in that case—which is the only ground ¹⁸² in the case at bar—the court says: “The appellant’s counsel insists that if the demurrer is not sustainable upon the second ground specified in section 144, it is upon the sixth. In this the counsel is in error. That relates only to the statement of facts constituting the cause of action. If this statement fails to show a right of action, then a demurrer on this ground may be interposed. But it has no application to the capacity of the plaintiff to sue or to the other grounds of demurrer specified.” This case was expressly approved, and the rule there stated declared to be right

by this court in *Swamp etc. Land Dist. No. 110 v. Feck*, 60 Cal. 403. In that action the plaintiff was designated in the title of the case as "Swamp and Overflowed Land Reclamation District No. 110 of the State of California," but there was no averment in the complaint that plaintiff was ever a swamp and overflowed land district; and for this omission the complaint was demurred to because it did not state facts sufficient to constitute a cause of action. (There was also a second cause of demurrer that two separate causes of action had been improperly united.) The court said: "The first ground of demurrer is, that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are in substance that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action: *Phoenix Bank v. Donnell*, 40 N. Y. 410." And the court, following the New York case, said further: "A demurrer on the ground that the plaintiff has not legal capacity to sue would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer: Code Civ. Proc., sec. 432; *Phoenix Bank v. Donnell*, 40 N. Y. 410." In *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195, the said case of *Swamp Land Dist. v. Feck*, 60 Cal. 403, is expressly approved, and quotations made from it which refer to *Phoenix Bank v. Donnell*, 40 N. Y. 410; and the same thing occurs in *Wilhoit v. Cunningham*, 87 Cal. 458, 25 Pac. 675. Appellant cites as supporting a different rule *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 360, *Loup v. California Southern R. R. Co.*, 63 Cal. 97, and *People v. Central Pacific R. R. Co.*, 83 Cal. 395, 23 Pac. 303. In the *Oroville* case the legal existence of the plaintiff as a corporation was denied in the answer, and no question as to the sufficiency of the complaint was involved. In the *Loup* case the author of the leading opinion, after holding that the demurrer to the complaint ought to have been sustained for various other reasons, merely adds, as a sort of further assurance, that "in the fourth count of the complaint there is no averment of the defendant's corporate existence"; but no one of the other justices concurred in that expression. In *People v. Central Pac. R. R. Co.*, 83 Cal. 395, 23 Pac. 303, the writer of the main opinion, after holding

that the demurrer to the complaint was properly sustained upon various grounds, which are elaborately discussed, does say that "an averment of defendant's corporate existence is necessary in every count of the complaint against a corporation"—citing the Loup case; but there is no discussion of the question and no reference to the cases above referred to, where the question was directly before the court and expressly adjudicated, approving and restating the rule announced in Phoenix Bank v. Donnell; the sentence quoted was not necessary to the decision, and it cannot be taken as overruling those cases. Moreover, Wilhoit v. Cunningham, 87 Cal. 458, 25 Pac. 675, was the latest declaration of the court on that subject. And we are satisfied that in Swamp Land Dist. No. 110 v. Feck, 60 Cal. 403, and in the subsequent cases approving it, above cited, the rule is correctly declared.

Under the above views it is not necessary to consider respondent's discussion of "aider by verdict" and other points made by it.

The judgment appealed from is affirmed.

Lorigan, J., and Henshaw, J., concurred.

In an Action by or Against a Corporation, it is unnecessary to aver its corporate existence, except in cases where the action, in its gist or substance, involves the fact of corporate existence. Failure to allege corporate existence in an action against a corporation cannot be taken advantage of by general demurrer: Holden v. Great Western Elevator Co., 69 Minn. 527, 65 Am. St. Rep. 585. See, too, Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am St. Rep. 888; Brady v. National Supply Co., 64 Ohio St. 267, 83 Am. St. Rep. 753; note to Miller v. Pine Min. Co., 35 Am. St. Rep. 291, 292. But compare Miller v. Pine Min. Co., 3 Idaho, 493, 35 Am. St. Rep. 289.

GRANNIS v. SUPERIOR COURT.

[146 Cal. 245, 79 Pac. 891.]

JUDGMENT, Power of Court Over, When Terminates.—After proceedings to vacate a judgment on motion for a new trial, or on appeal, or under section 473 of the Code of Civil Procedure have ended, and the time therefor has expired, the superior court has no power to vacate or modify its judgment in a matter of substance on account of judicial error in the decision, no matter how apparent such error may be on the face of the record. (pp. 25, 26.)

JUDGMENT, Motion to Vacate or Modify, When a Matter of Substance, and not for the Correction of a Clerical Error.—A motion to modify a judgment by striking therefrom that part purporting to grant an absolute and immediate divorce, on the ground that

the court had not jurisdiction at the time of granting such divorce, goes to the substance and effect of the judgment, and is not for the correction of a clerical error, and hence cannot be granted after the time to appeal from, or to modify or vacate, the judgment as fixed by the statute has expired, unless the judgment in respect to the provision referred to is void. (p. 26.)

JUDGMENT of Divorce, When Void.—If a statute provides that a court in actions for divorce must, after the trial thereof, file its decision and conclusions of law, and, if it determines that a divorce ought to be granted, must enter an interlocutory judgment declaring that the party in whose favor the court decides is entitled to a divorce, and that one year after such interlocutory judgment is entered, the court may, on motion of either party, or upon its own motion, enter a final judgment granting the divorce, a judgment entered in the first instance granting an absolute and immediate divorce is not erroneous merely, but is beyond the jurisdiction of the court, and void. (p. 30.)

JUDGMENT, When Void on Collateral Attack.—The cases holding judgments valid on collateral attack, though founded upon an erroneous view of the law, are none of them cases in which the law which the court mistook was the law which vested it with jurisdiction over the subject matter. (p. 32.)

JURISDICTION of the Subject Matter, When Open to Inquiry. Where the question upon which jurisdiction depends is one of law purely, jurisdiction over the subject matter is always open to collateral inquiry. (p. 33.)

CONSTITUTIONAL LAW—Divorce, Statute Denying Right for One Year to Enter a Final Decree of.—Though the constitution confers jurisdiction on the superior courts over actions for divorce, a statute requiring the court in such actions, if it finds the party entitled to a divorce, to enter a decree so declaring, but not to enter final judgment until one year after the entry of the interlocutory decree, is not unconstitutional. (pp. 33, 34.)

JUDGMENT of Divorce, Motion to Vacate by Striking a Void Provision from.—Where a decree is void in so far as it purports to grant an immediate divorce, the court may, at any time, on its own motion or the motion of either party, so declare, and may modify such decree by striking the void provision therefrom. (p. 34.)

Galpin & Bolton, for the petitioner.

A. P. Van Duzer, for the respondents.

²⁴⁵ SHAW, J. This is a proceeding in prohibition to prevent the superior court of San Francisco from acting upon a motion pending before it to modify a judgment.

²⁴⁶ On June 25, 1903, an action for divorce, in which Amelia B. Grannis was plaintiff and James G. Grannis was defendant, was regularly tried by the superior court, and on July 1, 1903, said court rendered and entered its judgment in said action purporting to grant an absolute and immediate divorce to the plaintiff. The decree as entered was signed by the judge, and the decree proper was preceded by a recital that it appeared to the

court "that all the allegations contained in the plaintiff's complaint are true," except certain facts not material. There were other recitals which were equivalent to special findings as to the amount of the community property and as to the children, which are immaterial to the consideration of the present case. The portion of the entry constituting the judgment of divorce was as follows:

"It is now, therefore, ordered, adjudged and decreed as follows, to wit: That the marriage between the plaintiff, Amelia B. Grannis, and the defendant, James G. Grannis, be dissolved, and the same is hereby dissolved, and said parties are, and each of them is, freed and absolutely released from the bonds of matrimony existing between them, and all the obligations thereof." Other provisions of the decree disposed of the property and the custody of the children.

Proceedings on appeal and motion for new trial having terminated without effect, the plaintiff on August 31, 1904, more than a year after the judgment, served on the defendant notice of a motion to set aside the portion of the decree above quoted, on the ground that it was void, it being in form and effect a final judgment of divorce instead of the interlocutory judgment prescribed by the act of 1903. In pursuance of this notice, plaintiff, on September 2, 1904, presented the motion to the court, and the court, against the defendant's objections, declared its intention to determine said motion and to make an order, to quote its own language, "that so much of said decree as awards to the said plaintiff an absolute decree is hereby vacated and set aside; but said decree, in so far as it may determine that the plaintiff is entitled to a divorce, shall be in no way modified or affected by this order." The object of the present proceeding is to prevent the superior court from making the order, or from further proceeding in pursuance of the motion.

The contention of the petitioner is, that the judgment entered ²⁴⁷ by the court on July 1, 1903, was both in form and effect a judgment of absolute divorce, and that as proceedings for new trial and on appeal have ended, and more than six months had elapsed at the time proceedings on the motion were begun, the superior court has no power to modify or vacate it.

After proceedings to vacate or modify a judgment on motion for new trial, or an appeal, or under section 473 of the Code of Civil Procedure, are ended, and the time therefor has expired, the superior court has no power or authority to vacate or modify its judgment in a matter of substance on account of judicial

error in the decision, no matter how apparent such error may be on the face of the record. Its power thereafter is limited to the correction of mere clerical misprisions on the record, or to the excision of such parts of the record as appear to be, or can be shown to be, void for lack of jurisdiction or power: *Egan v. Egan*, 90 Cal. 15, 20, 27 Pac. 22; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 390, 32 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452. The modification proposed to be made herein is not the correction of a clerical error, but goes to the substance and effect of the judgment.

Under these circumstances the superior court has no power to make the order in question, unless the judgment proposed to be so modified is absolutely void as a final judgment. When the judgment was rendered the court had jurisdiction of the subject matter in general and of the parties. The general rule is, that, under such circumstances, a judgment, however erroneous, is not void. It must be conceded that the court cannot make this order unless, by the legislation of 1903 (Stats. 1903, pp. 75, 76, 176) amending section 61 of the Civil Code and adding thereto sections 131 and 132, the court is divested of power to enter a final judgment granting a divorce until it has first entered an interlocutory judgment declaring a party entitled to a divorce, and an interval of one year has passed thereafter before such final judgment.

The provisions of the code must be construed with a view to effect its objects (Civ. Code, sec. 4), and when the language used is not entirely clear, the court may, to determine the meaning, and in aid of the interpretation, consider the spirit, intention, and purpose of a law, and to ascertain such ²⁴⁸ object and purpose may look into contemporaneous and prior legislation on the same subject and the external and historical facts and conditions which led to its enactment: 26 Am. & Eng. Ency. of Law, 601-603, 623, 624, 632.

The institution of marriage is an important feature of civilization, and its preservation is essential to the maintenance of organized society. As was said in *Deyoe v. Superior Court*, 140 Cal. 482, 98 Am. St. Rep. 73, 74 Pac. 30: "In every civilized country marriage is recognized as the most important relation in life, and one in which the state is vitally interested. . . . The well-recognized public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage parties to live together, and to prevent separation and illicit unions." Owing to the strength of human passions and

the weakness of human nature the regulation and preservation of the institution of marriage and the prevention of the abuse of the right of divorce have always been one of the most difficult problems of government. It has been considered essential to the promotion of happiness and the good order of society to provide that for certain offenses against marital rights the innocent party could, under fixed restrictions, have the marriage dissolved by judicial decree. But it has been found that this right is often abused; that by collusion and fraud, by fabricated testimony, or by the exaggeration of trifling offenses, divorces are obtained which should not have been granted; that when the procedure is easy and speedy slight causes are magnified and made the pretext for hasty divorces, and that too frequently actions for divorce are not prompted by the necessity of relief from marriage bonds which, by the fault of the other party, have become the cause of misery and suffering, but are inspired by a desire to become free from the old obligations in order to make a new alliance. It has also been found that in some cases difficult complications occur, arising from divorced persons contracting a subsequent marriage before the judgment of divorce became final by the expiration of the time within which an appeal could be taken. To prevent or mitigate these evils it has always been the legislative policy to make many restrictions in the procedure in divorce cases which are not applicable in ordinary actions.

²⁴⁹ In continuation of this policy the legislature in 1897 amended section 61 of the Civil Code so as to provide that a marriage contracted by a divorced person during the life of the former spouse, and within one year after the time of the judgment in divorce, should be illegal and void: Stats. 1897, p. 34. Immediately it was contended that this law was of no effect beyond the confines of the state, and that marriage solemnized during the year after the divorce within another state or territory, which were valid by the laws of such state or territory, must be recognized as valid in this state. Numerous attempts thus to evade the law were made, and much difference of opinion existed as to the legality of such marriages, until finally, in August, 1902, it was decided by this court that such marriages were valid in this state, and the question was thus settled: *Estate of Wood*, 137 Cal. 130, 69 Pac. 900. Thereupon the act of 1897 became practically a dead letter. All who wished to enter into another marriage within the year easily accomplished their purpose and evaded the law by a short journey beyond the borders of the state.

At its next ensuing session the legislature passed the acts making a second amendment to section 61, and adding the new sections as above mentioned. By the last amendment to section 61 it was provided, with respect to a second marriage to a different person during the life of a former spouse, that "In no case can a marriage of either of the parties during the life of the other be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for a divorce." The new sections 131 and 132 are as follows:

"131. In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final.

"132. When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, ²⁵⁰ or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action; but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either."

The manifest purpose of these several amendments was to avoid the effect of the decision in *Estate of Wood*, 137 Cal. 130, 69 Pac. 900, by going a step further than the law of 1897. That law simply prohibited a remarriage within one year, and made such marriage illegal and void, if made within this state, but it did not affect the procedure in an action for a divorce nor the validity or effect of a judgment therein. The law of 1903

acts upon the proceeding and upon the judgment, and secures the same period of delay as the former act, by providing for a delay in the entry of final judgment dissolving the marriage for at least one year after the trial and interlocutory judgment in the action. It thus presents the same obstacle to speedy divorces, the same opportunity for reflection and reconciliation, and the same check to collusion and fraud, and in the meantime it effectually prevents a subsequent marriage with another person by the simple provision that the former marriage, during the interval, shall remain undissolved. The ultimate object, of course, was to reach and mitigate the same evils to which the act of 1897 was directed.

For a time after this act took effect there was some difference of opinion among the judges of the superior courts with respect to its validity, several of them holding it unconstitutional and granting what purported to be immediate final judgments of divorce in disregard of its provisions. The question was settled in favor of the validity of the law by this ²⁵¹ court in *Deyoe v. Superior Court*, 140 Cal. 482, 98 Am. St. Rep. 73, 69 Pac. 900. In the meantime, however, a number of so-called final judgments had been entered, among them the one here involved.

It is obvious that the entire purpose of this legislation will be practically defeated if the law receives a construction which will enable the courts at the request, or with the consent, express or implied, of the parties, or either of them, to give final judgment immediately upon the trial, and without a previous interlocutory judgment. In order to reach this conclusion the law must be held to be merely directory in this respect and the disregard of it a mere error not affecting its validity except upon appeal, or in some form of direct attack. The departure from the prescribed order of proceeding, with the consent or acquiescence of the parties, must be considered as an irregularity which is waived, and the giving of an immediate final judgment held an error, which, whether expressly waived or not, can be effectively cured and the judgment placed beyond attack, by the mere failure to appeal. Persons seeking or submitting to a divorce for the purpose of entering into another marriage, or in collusion for any improper purpose, will request, consent to, or acquiesce in an immediate final judgment, many cases will occur in which it will seem a harmless deviation from the strict course of procedure, the matter will seem unimportant, and the desire or request of the parties, or the seeming necessities of exceptional cases, will prevail, and final judgments will be im-

mediately given. It will soon become customary. The evil-disposed persons, against whom alone the law is directed, will be the ones who will avail themselves of this opportunity to evade its true intent and purpose.

In view of these considerations we think that, if it is reasonably possible, the terms of the act should receive a construction calculated to make its object and purpose secure, and which will make it impossible for either party to contract another lawful marriage within a year from the time of the trial and interlocutory judgment. The language is clearly susceptible of this construction, and the object and purpose to be accomplished make it necessary to reject any other construction. It declares that "if it [the court] determines that the divorce ought to be granted an interlocutory judgment must ²⁵² be entered" (section 131); and further, that "when one year has expired after the entry of such interlocutory judgment the court may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons," and that if an appeal is taken from the interlocutory judgment, or a motion for a new trial is made, "final judgment shall not be entered until such appeal or motion has been finally disposed of" (section 132), and by section 61 a subsequent marriage is made void if contracted within the year after the interlocutory judgment. These provisions, interpreted in the light of the previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered.

This conclusion receives additional support from a consideration of the nature of a proceeding for a divorce, and of the recognized public policy on the subject. The parties to such an action have not the right to control procedure as in other actions. The court is not bound by admissions in the pleadings nor by the stipulations of the parties, nor is its inquiry as to the facts limited by the pleadings: 7 Ency. of Pl. & Pr. 88, 121. Nor can a divorce be granted solely upon the testimony or admissions of the parties: Civ. Code, sec. 130; 9 Am. & Eng. Ency. of Law, 845. The state is interested in the matter. In *Deyoe v. Superior Court*, 140 Cal. 482, 98 Am. St. Rep. 73,

74 Pac. 30, it is said: "While an action to obtain a decree dissolving the relation of husband and wife is nominally an action between two parties, the state, because of its interest in maintaining the same unless good cause for its dissolution exists, is an interested party. It has been said by eminent writers upon the subject that such an action is really a triangular proceeding in which the husband and wife and the state are parties": See, also, *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 6; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523; *Hatton v. Hatton*, 136 Cal. 356, 68 Pac. 1016; *Newman v. Freitas*, 129 Cal. 292, 61 Pac. 907, 50 L. R. A. 548; 1 *Nelson on Divorce*, ²⁵³ pp. 2, 17, secs. 1, 7. The rule in actions affecting property that the parties interested may control the disposition of the interests involved, and that the judgment of the court will be made to conform to such dispositions, when ascertained, has no application to divorce cases. Hence it follows that in such cases there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public or for the protection of the interest which the state has in the preservation and permanence of the marriage relation. The provision forbidding the granting of a divorce solely upon the admission, stipulation, or testimony of the parties goes to the sufficiency of the proof, which is not ordinarily disclosed upon the record. A disregard of this provision cannot be made to appear of record except upon appeal, and for this reason it cannot be made the subject of inquiry upon any collateral attack. But on appeal, where such disregard appears, it is always held to be an act beyond the power of the court to do, or of the parties to sanction, and absolutely void. The restriction now under consideration is of such a nature that a disregard of it must always be apparent upon the face of the record, and, consequently, the lack of power in the court will appear in every case upon an inspection of the record alone.

The rule invoked by the petitioner, taken in connection with the construction we have given to the act, would put the premature entry of final judgment of divorce in the class of errors which can always be reached on collateral attack. *Tallman v. McCarty*, 11 Wis. 406, cited and relied on by petitioner, states the rule as favorably to him as any case that can be found. The law of Wisconsin provided that in partition suits there should be an interlocutory judgment declaring the interests of the parties, that commissioners to make partition were then to be appointed, and upon the confirmation of their report the court was author-

ized to render a final judgment of partition. Commissioners were appointed and final judgment rendered in accordance with their report, but there had been no interlocutory judgment. On collateral attack in the above case the court held the judgment valid and said: "No order which a court is empowered, under any circumstances, in the course of a proceeding over which it had jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, ²⁵⁴ or in a manner not warranted by law, or the previous state of the case. The only question in such a case is, Had the court or tribunal the power, *under any circumstances*, to make the order or perform the act? If this be answered in the affirmative, then its decision upon those circumstances becomes final and conclusive, until reversed by a direct proceeding for that purpose." The italics are our own. It is to be observed that no question of public policy was there involved, and that the public had no particular interest in the decision of the case, nor was there anything in the statute governing the procedure in that case which could be construed as a restriction upon the ordinary powers of the court. In a partition suit the parties could agree as to their respective interests, could waive an interlocutory judgment and consent to the immediate appointment of commissioners, or even to an immediate final judgment, without any preliminary proceedings at all, without in any respect contravening public policy or transgressing restrictions made to protect the interests of society. The law in question in this case, as we have construed it, is a limitation upon the power of the court with respect to the subject matter, so that the court shall not be competent to grant a final divorce at any time during the year succeeding the interlocutory judgment, and so as to require that the interlocutory judgment be first entered. The parties could not waive these proceedings, nor invest power in the court by their consent or acquiescence. The purpose of the statute is to provide that in any event and under all circumstances there shall be an interval of one year after the party is declared to be entitled to a divorce before it can become absolute. The question above stated cannot here be affirmatively answered. There can be no state of facts which will give the court power to enter final judgment immediately. Hence, upon the face of the record, and as a matter of law, the final judgment in question is, as a final judgment, without actual or possible authority, and is therefore necessarily void.

The cases holding judgments valid on collateral attack, although they may be necessarily founded upon an erroneous view

of the law, are none of them cases in which the law which the court mistook was the law which vested the jurisdiction or power over the subject matter in the court. So far as they ^{are} are cases involving jurisdiction of this class at all they are confined to instances where the jurisdiction over the subject matter is by law made to depend on the preliminary determination of a question of fact. In that event a determination of the court rendering the judgment that the facts which give the jurisdiction exist is conclusive in all collateral inquiries: *Farmers' and Merchants' Bank v. Board*, 97 Cal. 328, 32 Pac. 312; *In re Grove Street*, 61 Cal. 438; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467. But where the question upon which the jurisdiction depends is one of law purely the jurisdiction over the subject matter is always open to collateral inquiry: *In re Grove Street*, 61 Cal. 438; *Arroyo D. etc. Co. v. Superior Court*, 92 Cal. 52, 27 Am. St. Rep. 91, 28 Pac. 54; *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467. Mr. Freeman says: "When a tribunal has not jurisdiction over the subject matter, no averment can supply the defect; no amount of proof can alter the case. As power over the subject matter is given by law, nothing but an additional grant from the legislative authority can extend that power over a class of cases formerly excepted": 1 Freeman on Judgments, sec. 120. And also, "If a court grants relief, which under no circumstances it has any authority to grant, its judgment is to that extent void": 1 Freeman on Judgments, sec. 120c.

It is contended that the law, if thus construed, would be unconstitutional. The constitution, it is said, confers upon the superior court full jurisdiction of actions for divorce, and the effect of this law would be to arrest the exercise of this jurisdiction, and suspend further action for one year, and if it can do this for one year, it must have power to suspend its action indefinitely, or absolutely, and for an unlimited time, and, if such power exists, the legislature may thus practically destroy or divest the jurisdiction given by the constitution. If it were necessary to the validity of this act to hold that the legislature has power to suspend absolutely the functions of the superior court the argument might have weight. We do not consider it necessary. It is sufficient to hold that the legislature has power to make reasonable regulations as to the proceedings by which the jurisdiction in such cases is exercised, and to prescribe the terms and conditions on which a divorce may be granted, and that in view of the subject matter and purpose of the act, a pro-

vision for the postponement ²⁵⁶ of final judgment for one year and a suspension of the power of the court to enter such judgment in the meantime, is not an unreasonable regulation of the procedure, and is within the legislative power to prescribe, as a condition necessary to the existence of the right to a divorce. The right to a divorce is subject to the legislative will, and exists only by legislative grant. The change in the method made by this law affects only the procedure and the right of the parties to an immediate divorce, and does not take jurisdiction from the court. The right to a divorce, not being inherent or constitutional, but statutory, the legislature could repeal the law and thus effectually prevent the granting of any divorces, or it could suspend the right for any number of years after the beginning of the action, without affecting the jurisdiction of the court. The legislature has complete control of the subject and may impose whatever restrictions or delays it pleases either in regard to the time for beginning the action, or the method and order of procedure after the action is begun. The grant of jurisdiction means only that such limited rights of divorce as the legislature provides are cognizable in the superior court under such system of procedure, and subject to such restrictions as may from time to time be established.

The judgment in question, being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to declare it null, in so far as it purported to be of such effect: *People v. Davis*, 143 Cal. 675, 77 Pac. 651; *People v. Temple*, 103 Cal. 453, 37 Pac. 414.

It is urged that "the greater contains the less" (Civ. Code, sec. 3536), and hence that, as the judgment in question necessarily determines that the plaintiff is entitled to a divorce, it is therefore valid to that extent as an interlocutory judgment under the statute, and that the court should not vacate it, but should regard it as valid to that extent, and, the year having expired, should now enter a final judgment. Cases are cited to the effect that a judgment for too much, or in excess of the power of the court, is not wholly void, but is void only in so far as it is beyond the jurisdiction: *Anderson v. Parker*, 6 Cal. 201; *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 372; *People v. Brown*, 113 Cal. 35, 45 Pac. 181. For the purposes of this decision this ²⁵⁷ may be conceded. There are strong reasons in support of the proposition. If the order proposed to be entered by the superior court in pursuance of the motion was as far-

reaching as the motion and purported to set aside the judgment for all purposes, it would be necessary to decide the question. It does not go so far. It purports only to vacate "so much of the decree as awards to the said plaintiff an absolute divorce," and expressly declares that, "in so far as it may determine that the plaintiff is entitled to a divorce," the judgment is neither *to be modified* nor affected by the order. The proposed order *is therefore* strictly within the power of the superior court, and the writ of prohibition should not be issued.

The petition is denied.

Angellotti, J., Van Dyke, J., Lorigan, J., McFarland, J., Henshaw, J., and Beatty, C. J., concurred.

The Case of *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897, was an application for a writ of mandate to compel a judge of the superior court to make and cause to be entered a final judgment of divorce. The court had, on September 4, 1903, entered a final decree of divorce, and such part of the decree was, under the decision in the principal case, void, because of the statute therein referred to. On September 15, 1904, the court made an order setting aside the final decree on the ground that it was void, and directing that an interlocutory decree be entered, *nunc pro tunc*, as of September 4, 1903, declaring the plaintiff entitled to a divorce. On September 15, 1904, the plaintiff applied for a final decree, which was refused on the ground that the formal interlocutory decree was not in fact entered until September 15, 1904, and that one year not having passed since its actual entry, no final decree could be entered. The supreme court was of the opinion that the defendant, the judge of the superior court, was correct in the position that the year which must elapse before a final judgment could be entered began to run from the time of the actual entry of the interlocutory judgment, and not from the theoretical *nunc pro tunc* date of entry, but the court was further of the opinion that, as the decree as originally entered declared that all the allegations of the complaint were sustained by competent evidence and that the matters alleged and proved were sufficient in law to entitle the plaintiff to the relief prayed for therein, that this portion of such judgment as originally entered was valid; that the remainder declaring the plaintiff entitled to an immediate divorce might be disregarded as void; that all the court could do at the time it made the order purporting to set aside the whole judgment was to vacate the part granting an immediate divorce; that, therefore, the interlocutory decree *nunc pro tunc* was unnecessary, the order to enter it was without authority, that the proceeding might be treated as if such *nunc pro tunc* entry had never been made, and that, as a year had elapsed between

the actual entry of the first judgment, which stands as a sufficient interlocutory judgment, and the application of the plaintiff for final judgment, he was entitled to a judgment granting the divorce, and that a writ of mandate should issue requiring such judgment to be entered.

A Divorce Statute prohibiting the entry of a final decree until after one year from the decision of the court is discussed, as to its constitutionality, in *Devoe v. Superior Court*, 140 Cal. 476, 98 Am. St. Rep. 73.

A Judgment without Jurisdiction is void, and may be denied or contested in any proceeding, direct or collateral: *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299; *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483.

SOUTHERN PACIFIC RAILROAD COMPANY v. SAN FRANCISCO SAVINGS UNION.

[146 Cal. 290, 79 Pac. 961.]

EMINENT DOMAIN—Damages, When the Same as if the Fee were Taken.—Ordinarily, when land is sought to be taken as a right of way for a railway, though nothing but the easement is to be acquired, the damages are practically the same as if the fee were taken, and when such is the case, the law requires the condemning corporation to pay the value of the fee as the measure of damages sustained. (pp. 38, 39.)

EMINENT DOMAIN—Damages, When do not Extend to the Whole of the Fee.—When it can be shown that the fee burdened by the easement is of some substantial value to the owner, this must be taken into consideration in determining the damages to be awarded for the imposition of an easement on the land, and the value of the fee cannot be said to constitute the measure of such damages. (pp. 39, 40.)

EMINENT DOMAIN—Railroad, Property and Estates Which may be Taken for.—In condemning a right of way for a railway, no more land and no greater interest in it can be taken by the company than the public use requires, which is ordinarily the surface of the land. (p. 40.)

EMINENT DOMAIN—Minerals in Land, Right to.—Whatever minerals lie beneath the right of way to lands acquired by a railroad company in proceedings in the exercise of the right of eminent domain are reserved to the owner, and he may by drifts from tunnels sunk on his adjoining land, provided he leaves a sufficient support for the easement of the railway company, take out all minerals beneath its right of way. (pp. 40, 41.)

EMINENT DOMAIN—Oil Lands, Damages for Right of Way for Railway Across.—By proceedings in the exercise of the right of eminent domain to acquire a right of way for a railway, the owner of the land does not lose, and the company does not acquire, the right to oil beneath the surface. This interest, which remains in the owner, must be considered in determining his damages, and if,

by putting down wells on the adjoining land, he can draw out the oil beneath the surface of the right of way, this fact must be considered in determining his damages, and such damages cannot be the same as if by the proceeding the company acquired the fee. (pp. 42, 43.)

EMINENT DOMAIN—Right Remaining in the Land Owner Respecting Oil Beneath the Surface.—The interest reserved to the owner of the fee where a right of way is acquired by condemnation over his land in petroleum beneath the surface is in all respects the same as if he had made a grant or lease of a portion of the surface, reserving to himself as owner of adjoining land the right to all minerals beneath the granted or leased tract, but without the right to enter on the surface to sink wells. (p. 44.)

EMINENT DOMAIN—Damage for Easement Over Oil-bearing Lands.—The rule pertaining to the determination of the value of an easement which is adopted with reference to mineral lands where the minerals are in situ is applicable to like easements over oil-bearing lands, though the practical application of the rule may be more difficult as to oil-bearing lands. (pp. 44, 45.)

EVIDENCE—Market Value.—Where a witness shows that he is qualified to testify respecting the market value of lands, and purports to do so, his testimony should not be stricken out on the ground that it is merely speculative and conjectural, because he also states that he would take into consideration what he would pay for it and have sufficient margin for speculation during at least five years. (p. 45.)

EMINENT DOMAIN—Damages for Taking Oil-bearing Lands.—Where the question in proceedings in the exercise of the right of eminent domain is what damages shall be awarded for a right of way over oil-bearing land, the plaintiff should be permitted to prove progressive decrease in the production of the oil-field within which the land in question is situated. (p. 46.)

Canfield & Starbuck, for the appellant.

Richards & Carrier, for the respondents.

²⁰¹ LORIGAN, J. This action was brought to condemn a right of way for a relocated railroad of plaintiff in the county of Santa Barbara. The strip sought to be condemned consisted of about two-thirds of an acre of land belonging to the defendant ²⁰² corporation. This strip lay along the southern boundary of a larger tract, several acres in extent, belonging to the same owner, and located within the exterior limits of the Summerland oil-field, or district, in which the oil flows naturally from higher or shallower to lower or deeper wells. The defendant Becker has an interest in both pieces of property under a contract with the defendant corporation.

The case was tried before a jury, and all issues having been waived except as to the value of the property taken, the evidence in the case was limited solely to that question, and, being submitted to the jury, a verdict was rendered in favor of de-

fendant. The plaintiff moved for a new trial, and from the order denying it appeals.

The main point on this appeal relates to the proper measure of value which should be applied in a suit to condemn land of the character involved here—namely, oil land; whether an easement acquired over a strip of oil-bearing land, part of a larger tract of the same character owned by the same person, is equivalent to taking the fee, and must be paid for as of the value of the fee, or may it, when applied to such land, be an interest different in law from the fee, having a substantially different value, and to prove which the plaintiff should be permitted to introduce evidence.

The lower court held, as a matter of law, that in condemning a right of way over this strip of land, part of a larger tract of oil-bearing land, that there could be no difference in value between the easement and the fee, and, not only, over plaintiff's objections, permitted defendants to address their evidence solely to the value of the fee, but instructed the jury that defendants were entitled to have an award to that extent.

It was insisted by the plaintiff upon the trial that it sought, and under the law was entitled to condemn, only an easement in property, and endeavored by cross-examination of defendants' witnesses, and by witnesses produced upon its own part, to show that there was in fact a substantial difference in value between the fee in this land and the easement it sought to condemn for a right of way across it. The court refused to permit them to make this showing, and under all these rulings the question whether the court was correct as to the measure of value it applied, is presented.

While it is no doubt true that under the law of this state a ²⁹³ railroad company is only entitled to acquire by condemnation proceedings an easement over the land, and that the fee thereof remains in the owner, yet, in most condemnation cases by railroad companies, this distinction, as far as it enters into a determination of the damages to be assessed for the right of way acquired thereby, has no practical application. Usually in such cases there is no substantial difference in value between the easement and the fee of which the law will take notice. Hence, in ordinary cases, where condemnation for a right of way for railroad purposes is sought, evidence is permitted to show, as the damages sustained, the full value of the land taken, upon the theory that the easement will be perpetual; that the right of way acquired, though technically an easement, will be permanent

in its nature, and the possibility of abandonment by nonuser so remote and improbable as not to be taken into consideration; that the exercise of the right will require practically the exclusive use of the surface, and that any interest which might be reserved to the owner in the fee would only be a nominal one and of no value. Under such circumstances, as there can be no substantial determinative value in the fee apart from the easement, the law will not consider them separately, but will require the condemning corporation to pay the value of the fee as the measure of damages sustained. To illustrate: Where a right of way is condemned over agricultural land or over building lots, this is in effect to take the entire value of the land. In either case the underlying ground upon which the easement is imposed can be of no value to the owner. The sole value of such lands consists of the use to which the owner could devote the surface—to cultivation or building—and when he is deprived of that use, the entire value of the land is taken from him, and, hence, for all beneficial purposes to the owner, there can be no difference in value between the easement and the fee; they are substantially identical in value.

And to illustrate further: If the whole of a tract of mineral land is to be condemned, whether such mineral has a fixed situs, such as gold, iron, or coal, or the land overlies minerals of a fugitive and wandering nature, such as petroleum oil or natural gas, which may be drawn from it, the same rule for determining the easement taken would apply. As these minerals can only be reached from the surface, when all the ²⁰⁴ surface is taken from him, the owner is deprived of the entire value of his land. A reserved ownership in the minerals would be merely nominal and of no advantage or benefit to him.

So that, in all these cases which we have instanced, it would be idle to endeavor to distinguish, in assessing damages, between the value of the easement and the value of the fee, because, in the nature of things, there is no real difference between them; when the easement is taken the fee is substantially taken, and for all practical purposes in measuring damages the value of the fee is the only available and proper standard.

But while it is the rule that where there is practically no substantial difference between the value of the fee and the value of the easement, the court may properly permit the value of the fee to be proven and assessed by the jury as the damages, yet, in theory, the distinction between the two re-

mains, and in all cases where it can be shown as a fact that the fee, burdened with the easement is of some substantial value to the owner, this value is reserved to him, and must be taken into consideration in determining the damages to be awarded for the imposition of an easement upon the land.

In condemning for a right of way, no more land and no greater interest in it can be taken by the railroad company than the public use requires, which is ordinarily the surface of the land. While it is true, as we have pointed out, that under some circumstances, in assessing damages, the value of the fee of the land taken is awarded, yet this is because in the nature of things there can be no difference in value between them. When, however, such a difference does exist, the rule is different, and the value of the easement taken as distinguished from the value of the fee, is alone to be ascertained by the jury, and the owner compensated therefor. And this difference in value may, and usually does, exist to a greater or less degree in all cases where the underlying estate is valuable for the minerals it contains, and when but a portion of the owner's land which contains them is burdened with the easement. Whatever minerals lie beneath the right of way are reserved to the owner, and wherever such minerals are in situ, underlying this right of way, while he may not enter upon it to take them (because the nature of the easement ²⁹⁵ requires exclusive possession of the surface by the company) he can drift from tunnels sunk upon his adjoining land and do so, leaving, however, sufficient support for the easement imposed. Subject to this support, the right of the owner of the land to take out all the minerals beneath the right of way is absolute. Under the condemnation the railroad company acquires the permanent and exclusive control of the surface of the land, but it acquires nothing more. It acquires no title to the minerals beneath the surface, and of course no right to dig beneath the surface for the purpose of appropriating them, and if it should undertake to do so, could be restrained at the instance of the owner of the underlying fee. While the title to the minerals underneath the right of way is reserved exclusively to the owner of the land across which it is condemned, there is no doubt that by being restricted from entering upon it, it may be much more difficult and expensive for him to take them out; far more so than if he could operate directly over the land which has been appropriated under the easement; and it may be that much valuable mineral would

have to be left to afford surface support, or if this were taken out, a substituted surface support would have to be provided by the owner. But evidence of all these matters would be submitted to the court and jury, and would enter as substantial factors in determining the value of the easement. They would not affect the reserved right of ownership in the fee.

While our attention has not been directed to any decision of this court adopting this as the rule in this state to be applied in assessing damages for the condemnation of a right of way over mineral lands, the authorities seem to be quite uniform upon the point in other jurisdictions, as far at least as lands containing minerals in situ are concerned, and the rule seems to be a reasonable and just one. Some of these authorities we cite: *Robbins v. St. Paul etc. R. R. Co.*, 22 Minn. 287; *Hollingsworth v. Des Moines etc. R. R. Co.*, 63 Iowa, 444, 19 N. W. 325; *Tyler v. Town of Hudson*, 147 Mass. 609, 18 N. E. 582; *Blake v. Rich*, 34 N. H. 289; *Phifer v. Cox*, 21 Ohio St. 255, 8 Am. Rep. 58; *Penn Gas Co. v. Versailles Fuel Gas Co.*, 131 Pa. St. 532, 19 Atl. 933; *Northern Pacific etc. Ry. Co. v. Forbis*, 15 Mont. 459, 48 Am. St. Rep. 692, 39 Pac. 571.

But the particular question presented in this case as to the ²⁹⁶ proper measure of value which should be applied where an easement is sought over oil-bearing land seems never to have been presented for determination to any court; at least our attention is called to no decision on the subject, and counsel upon both sides have been extremely thorough in the presentation and discussion of the subject.

Counsel for appellant, reasoning from analogy, insist that the same rule should apply to oil lands as to other mineral lands, while counsel for respondents claim that there is no room for such application; that there is such a radical and essential difference, both as to the character of the minerals and the nature of their ownership, as to make the rule inapplicable.

But we do not think this difference in ownership, or the character of the minerals, of such a nature as to make it impossible that an owner of adjoining land can derive any benefit from a reservation in his favor of the petroleum oils in place, or which are liable to accumulate by reason of the physical laws governing such fluids, under the land upon which the easement is imposed. Nor can it be said that it is impossible to show, in ascertaining the value of the easement acquired, that this reserved right has no determinative value separate from the easement.

These oils lie in reservoirs, and, collectively, the owners of the superincumbent lands have an exclusive ownership in them. The ownership of each, it is true, is only a qualified or partial ownership—a right to reduce the oil in the common reservoir to possession by sinking wells upon the particular tract of land owned by him overlying it. But when so being exercised, the owner of the well is not limited to any particular territorial area beneath the surface from which he may draw the oil. He may not only draw from his own land, but he is entitled to draw from the reservoir generally, and he naturally does draw, and is of right entitled to draw, to his own well the oil underlying the lands of other surface owners. This, of course, is a right common to all surface owners, and as the reservoir is not inexhaustible, there is a liability that, in the process of pumping, the oil beneath the lands of proprietors higher up on the strata will be naturally diminished, if not depleted, by being either drawn out, or by gravitation carried to lower and deeper wells. But aside from this liability to ²⁹⁷ loss from beneath particular lands, the ownership in the oil underneath that land may be said to be absolute in the owner of the surface. And if his right to take it out is not lost by virtue of being deprived of a part of his surface land, or his beneficial interest is only to some extent diminished, there is no reason why a corporation condemning a right of way across it, which takes only an easement, should pay for this reserved and available interest in the fee. That this reserved interest in the oil under the right of way was of a determinative value to the defendants, as owners of the adjoining land, was what the plaintiff sought to prove. Its contention was that, as such owners, it was possible for defendants to take out, by wells sunk along the border of the adjoining land, the oil in place beneath the strip composing its right of way, and by means of such wells to intercept the flow of oil from such adjoining land beneath the easement surface. And to the extent that this might be accomplished, it offered to show that this right was of value as something distinct and apart from the value of the easement, and we perceive no reason why it should not have been permitted to do so.

It is contended, however, by the respondents that whatever ownership the defendants may have in the oil beneath the right of way could only be made available from the surface; that ownership of the surface carries with it the only right in the oil which is of any value, and that is the right to reduce to possession the oil beneath that surface; and that if, by

putting down wells on the land adjoining, they can draw out the oil from beneath the right of way, they do not acquire such oil by virtue of any ownership they have in it as taken from the land subject to the easement, but they get it by virtue of their rights in the surface of the adjoining tract through which it is drawn.

We cannot accord with this line of argument. We do not think it keeps in view a proper distinction between the qualified ownership of a surface owner of land in the general oil deposits contained in the reservoir, and the like ownership which attaches to the specific quantity which from time to time may be under the surface of a particular tract of land. While, collectively, all the owners of the superincumbent land have a common interest in the oil deposit, yet the right of an owner of the surface of a particular tract of such land, to ²⁰⁸ reduce the oil under it to possession, can only be enforced when it comes under his land. If he can then reduce it to possession by drawing it from under all his land, notwithstanding his right to operate from a portion of the surface of such land for that purpose may be prevented by the imposition of an easement upon it, he retains the same right and to the same extent as he possessed it before the easement was imposed, and there necessarily would be a difference between the value of the reserved right and the value of the easement. It is true that usually the surface taken for a right of way would be the most advantageous point from which to draw the oil from beneath it, but, in the case instanced, it would not be essentially requisite. It might entail greater difficulty, and be attendant with less practical benefit and advantage for the owner of the adjoining land who retains this beneficial ownership in the oil underlying the right of way, to operate, in acquiring its possession, from the adjoining land than from the overlying surface, but these are matters which would have to be taken into consideration in estimating the value of the easement.

Nor is it true, as contended, that the appropriation of the surface of the oil-bearing land of itself necessarily destroys all right of defendants in the oil underneath it, by reason of such appropriation. As we have indicated above, this does not follow, if, as a fact, by virtue of owning adjoining lands, a reserved ownership in the oils beneath the surface easement is of value. Not only this, but there are certain legal rights which, while enforceable by any owner of the surface of oil-bearing lands, are equally secured to the defendants in protection of

their reserved rights to the oils underlying the easement, notwithstanding the surface control has been taken from them. By the condemnation proceedings, the plaintiff could not get any interest in the land itself, but only a right of way across it. It acquired no right to the underlying oils. If it should abstract them from under this right of way, the defendants could recover their value in an action for damages for their conversion, or could maintain an action in claim and delivery for their possession, to the same extent as against any other trespasser (*Hail v. Reed*, 15 B. Mon. 479; *Hughes v. Union Pipe Lines*, 119 N. Y. 426, 23 N. E. 1042), or if the plaintiff should attempt to sink wells on the right of way, it ²⁹⁹ could be restrained in equity at the instance of defendants, on the ground of a threatened irreparable injury. As is said in *Bettman v. Harness*, 42 W. Va. 437, 26 S. E. 272, 36 L. R. A. 566: "Such damages subtract from the very substance of the estate and tend to its ultimate destruction. . . . Petroleum oil in place is a part of the realty, and its unlawful removal a disherison equity will enjoin."

The interest reserved to the owner in the fee, owning adjoining land, upon condemnation of a right of way, is in all respects the same as if he had made a grant or a lease of a portion of the surface of his oil-bearing land, reserving to himself, as the owner of adjoining land, the right to all minerals beneath the granted or leased tract, but without right to enter upon its surface to sink wells. Such a right has been held to be a valuable one as to petroleum oil, notwithstanding its fugitive and wandering nature, and an attempted invasion of such right enjoined: *Westmoreland etc. G. Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731. It is true that in making a grant or lease with such a reservation in favor of his retained land, the grantor or lessor acts upon his own volition, and the value of the reservation depends upon his judgment, which may be influenced by the location of the different tracts and the area of granted and reserved lands and other considerations. But although the proceeding in condemnation is in invitum, these same matters can be taken into consideration in determining whether the reservation which the law makes in these minerals is of substantial benefit to the owner of the adjoining land. If this reservation is of no benefit, then, as a matter of course, the condemning party must pay for the easement whatever the value of the fee is ascertained to be. If, however, there is a beneficial ownership in the oils underlying the right of way,

as these are reserved to the owner of the fee, the value of this beneficial ownership must be taken into consideration as something separate and apart from the value of the easement, and the value of the easement alone assessed against the condemning party. As in condemnation proceedings only an easement is acquired, this is all that the law requires shall be paid for.

We discover no reason why the rule pertaining to the determination of the value of an easement which is adopted with reference to mineral lands, where the minerals are in situ, ~~and~~ should not be applied to easements over oil-bearing lands. In principle there is no distinction, though as to oil lands the practical application of the rule may be more difficult. It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals, but it cannot be said to be impossible to do it. It can hardly be that in every case where a right of way is sought to be condemned over a strip of oil-bearing land, that the valuable rights which were owned by the defendant when the condemnation proceedings were inaugurated, and which the condemning party does not acquire, are entirely lost to the defendant owning adjoining land by reason of the condemnation.

This disposes of the main point in the case, but appellant presents two other questions relative to rulings of the court.

It insists that the trial court should have granted its motion to strike out the testimony of the witness Rusk, called on behalf of defendant, as to the market value of the property in question, on the ground that it appeared from his cross-examination that his testimony in that respect was merely conjectural and speculative. We do not think so. The witness fully qualified himself on direct examination to give an opinion on the subject. On cross-examination he testified as to the matters which would influence him from the standpoint of a contemplating buyer in determining the market value of land in an oil-bearing territory; the number of wells which could be economically placed on the amount of land taken and ordinary losses therefrom; and the general relation of outlay to income. On cross-examination he entered into no details nor gave any estimates. These were matters which, it appears to us, would naturally be taken into calculation in forming a public and general estimate of the value of land of this character, and which would influence the minds of sellers and buyers with relation to it, and to which the witness could properly testify. It is true the witness, in addition, testified that he would take into consideration what "he could

pay for it and have sufficient margin for speculation during at least five years," which, of course, is not a factor in determining market value, and if the motion to strike out had been addressed to this particular testimony it would, doubtless, have been granted. It afforded, however, no warrant for ³⁰¹ striking out all the testimony of the witness, and the motion was properly denied.

It is further claimed that the lower court erred in refusing to allow appellant to prove a progressive decrease in the productiveness of the oil-field within which the land in question is situated. Upon the argument here, counsel for respondents do not discuss the right of the appellant to make such proof, but defend the ruling of the court on the ground that the question, as addressed to the particular witness, was too indefinite and vague. This was probably true. Upon a new trial, however, objection on that ground may be obviated. As a matter of right the appellant was entitled to introduce evidence upon the subject. Such evidence is admissible as bearing upon the market value of the land in question as oil-bearing land. As it is permissible to show that the land sought to be condemned is oil-bearing land, so it is permissible to show what kind of oil-bearing land it is, and to that end to show its degree of productiveness, whether increasing or decreasing.

The order denying the motion for a new trial is reversed, and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

As to What Damages are allowable where mineral land is condemned for a railroad under the power of eminent domain, see the monographic note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 295; *Seattle etc. Ry. Co. v. Roeder*, 30 Wash. 244, 94 Am. St. Rep. 864.

As to the Right of Abutting Owners to work mines under a highway, see the monographic note to *Wright v. Austin*, 101 Am. St. Rep. 111, 112.

PAYNE v. CUMMINGS.

[146 Cal. 426, 80 Pac. 620.]

HOMESTEAD in Contiguous Tracts.—Though land is bought from the government at different times and by different titles, it may constitute but one tract, all resided upon and in possession of the claimant, and be exempt from execution as his homestead. (p. 49.)

HOMESTEAD, Inclosure of.—It is not necessary that lands claimed as a homestead and described in the homestead declaration be inclosed with a fence. (p. 49.)

HOMESTEAD, Use of the Premises.—Where a tract of land consisting of a pre-emption and a desert claim is included in a homestead declaration, it is not necessary to show that the whole was devoted to any particular or profitable use by the claimant, or that he devoted it to any use whatever, other than as a part of his home place or home. (p. 49.)

HOMESTEAD, Amount or Area of.—If the property is situated in a rural district where farming and grazing are the only useful purposes it can be devoted to in addition to making a home of it, the amount, or area, which can be held as a homestead is limited only by its value. (p. 50.)

HOMESTEAD—Desert Land Claim.—The fact that land is desert and presumably unfit for agricultural purposes does not show that it may not, with other lands, be held as, and devoted to the use of, a homestead until it can be reclaimed and made fit for grazing or some other agricultural purpose. (p. 50.)

HOMESTEAD, Use of, What Unnecessary.—The question of use as applied to a homestead relates only to the use of the property as a home. If used as a home or a part thereof, it is immaterial whether it is farmed, grazed or devoted to any agricultural use whatever. The land may be used solely for living on without being devoted to any use at all, and still be a homestead. (pp. 50, 51.)

HOMESTEAD, Water Rights Included Within.—An interest in water rights, ditches, etc., though it is but a partial interest in an entire water system held jointly and in common with others, is, if obtained specially for use upon the lands claimed as a homestead, and necessary and appurtenant thereto, a part of the homestead and as such exempt from execution. (p. 51.)

HOMESTEAD, Abandonment or Annulment of.—A Conveyance of a Moiety or Part of a Homestead by a husband after the death of his wife, does not abandon or nullify the homestead exemption as against an execution based upon debts contracted by him in her lifetime. (p. 51.)

HOMESTEAD, Exemption in Favor of Grantee of.—The grantee of a person entitled to hold property exempt as a homestead takes title free from all lien and liability for the grantor's debts from which it was exempt at the date of his conveyance. (p. 52.)

HOMESTEAD in an Undivided Interest.—The rule that a homestead cannot affect an undivided interest in land is inapplicable where the interest as originally existing included the whole property, and the claimant subsequently conveyed a moiety thereof. (p. 52.)

J. H. Stewart, E. C. Bonner and G. F. Harris, for the plaintiff.

Spencer & Raker and Clarence A. Raker, for the defendants.

⁴²⁷ GRAY, C. This is an action for an injunction to restrain an execution sale of plaintiff's homestead. The homestead was declared upon and covered five hundred and twenty-three and ninety-four one-hundredths acres of contiguous land situated in Modoc county, of the value of three thousand dollars. Of this land one hundred and sixty acres constituted what was known as the "Payne Pre-emption," and the rest was known as the "Desert Claim." The declaration of homestead also included certain water rights, reservoirs and ditches in which plaintiff had a joint interest and which interest was appurtenant to the lands in question.

The findings and judgment are to the effect that the defendants do not intend to sell, and have not advertised for sale, the Payne pre-emption. It is also found and adjudged that there is no homestead upon any portion of the desert claim. It is further adjudged that the water rights, ditches, dams, reservoirs, ⁴²⁸ flumes, etc., are subject to the lien of the judgment and are not exempt from execution on account of the homestead.

The plaintiff Payne, on June 7, 1897, by deed conveyed to J. H. Stewart and D. W. Jenks a one-third undivided interest in the desert claim, and the water rights, ditches, etc., appurtenant thereto. It is decreed that whatever right, title, or interest was conveyed by said deed is not affected by the judgment, and that only the interest in said desert claim and the appurtenances thereto remaining in plaintiff be sold under the execution. The plaintiff appeals from the whole judgment, and the defendants appeal from that portion only which declares that the deed to Stewart and Jenks conveyed a one-third interest in the property and exempts the interest so conveyed from the execution sale.

The appeal of plaintiff. The declaration of homestead was in due form, and was duly executed and filed by plaintiff on the second day of October, 1888. It described and claimed the whole property, including the pre-emption, the desert claim, and the water rights, reservoir, reservoir site, ditches, dams, and flumes, as a homestead, and declared the value of the whole to be three thousand dollars. At that date the plaintiff was, with his family, living in a house on the pre-emption claim, and all the property was the community property of plaintiff and his wife. Plaintiff's title was that of pre-emption and des-

ert land claimant, which claims he afterward perfected, and obtained patents to all the land. Thereafter, and on the ninth day of March, 1890, the plaintiff executed to the Siskiyou County Bank, one of the defendants herein, his promissory note. On the ninth day of November, 1893, the wife of plaintiff died. In December, 1895, the said bank recovered judgment against plaintiff on said note. Thereafter, in January, 1896, the said bank caused execution to issue on said judgment, and caused the same to be levied upon the desert claim, water right, reservoir site, ditches, etc., appurtenant thereto.

The homestead embracing the desert claim as it did had the effect to exempt the same from execution. The water rights, ditches, reservoir site, etc., appurtenant to said desert claim were also part of said homestead, and likewise exempt.⁴²⁹ The findings and conclusions of the court to the contrary are based upon a wrong theory and are erroneous. The land was contiguous, and although it had been obtained from the government by different titles, it constituted but one tract of land, all resided upon, and in the possession and occupancy of the plaintiff. It was not necessary that it should be inclosed with a fence. Ditches had been built and water conducted by plaintiff upon the desert claim during the year 1888 and a part of 1889, and plaintiff's house where he resided being on the pre-emption claim evidenced a residence upon and occupancy of the entire tract, including the desert claim. He included the whole tract in his declaration, and claimed it all as his homestead. The entire property is conceded to be under the five thousand dollar limit of value allowed by law to the homestead claimant. It was not necessary to show that the desert claim was devoted to any particular or profitable use by plaintiff. Nor was it necessary to show that he devoted it to any use at all other than as a part of his home place or homestead. It was sufficient to show that it was devoted to that purpose, so resided upon, so occupied, so declared upon, and not used in any manner inconsistent with its use as a homestead. Those cases, applying to city or other property used altogether or chiefly for business purposes, have no application to a case of this character, where the property is situated in a rural district where farming or grazing is the only useful purpose it can be devoted to in addition to making a home of it. Our code places no limit on the amount of property that may be claimed as a homestead, except to confine it to the value of five thousand dollars. "The homestead consists of the dwelling-house in which the claimant resides and

the land on which the same is situated, selected as in this title provided": Civ. Code, sec. 1237. There is nothing to be found in the above section or elsewhere in the code that can properly be construed into a limitation of the area of the homestead as applied to property here in question. The homestead declared upon may embrace an area even greater in value than the five thousand dollar homestead exemption allowed by section 1260 of the Civil Code. In such a case the homestead is not void, but proceedings must be had under section 1245 et seq. of the Civil Code for the appraisement and division or sale of the property. Let the area be ever so ⁴³⁰ large, no division even can be had in court except for excess in value. A careful examination of all the cases in this state wherein it has been held that the homestead declaration covered property that could not be properly treated as a part of the homestead will disclose that in every such case the property excluded from the homestead was either occupied as the home of some person other than the homestead claimant, or had on it a house in which an independent business was carried on, or was devoted to some other purpose entirely foreign to and inconsistent with its use as a homestead. In many cases in this state hundreds of acres of land in the country, fenced and cross-fenced, have been held to be properly embraced in the homestead. In one case (*Ornbaum v. His Creditors*, 61 Cal. 455) a homestead was declared upon eleven hundred acres of land, three hundred acres of which was inclosed with a fence, and the rest, uninclosed, used by the homestead claimant in conjunction with his neighbors as grazing land, the dwelling-house being situated on the inclosed part, and it was held that the whole property was impressed with the character of a homestead. It was also held that the fact that title to much of the uninclosed portion of the land was subsequently acquired by the claimant from third parties who had pre-empted the same did not affect the homestead. The court said in that case: "Now it is objected that Ornbaum had no actual residence on the land outside of his inclosure at the time the declaration of homestead was filed. His residence within the inclosure was sufficient upon the facts as found. He had title to and exercised control over all the land. The evidential facts inserted in the findings of fact (we refer to those as to the neighbors grazing the uninclosed portion, and the taking up of pre-emption claims on the land) have no proper place there, but they, with the other facts found, and which follow them in order in the findings, sustain the judgment of the court." The fact that the land here

was desert, and presumably unfit for agricultural purposes, is no good reason why it could not be claimed as and with the pre-emption claim devoted to the uses of a homestead until it could be reclaimed and made fit for grazing or some other agricultural purpose. The question of "use" as applied to the homestead relates always, as will be seen from an examination of the cases, to the use of the property as a home. If ⁴³¹ it is used as a home, or as a part of the home place, it is immaterial whether it is farmed, grazed, or devoted to no agricultural use at all. The material thing to be shown is, that it is devoted to use as a home for the claimant and his family, and that no part of it is applied to any use inconsistent therewith. It is plain that land may be used to live on solely without being devoted to any other use at all and still be a homestead.

The interest in the water rights, ditches, etc., though it was but a partial interest in an entire water system held jointly or in common with others, yet as it was obtained specially for use upon the lands claimed as a homestead, and was necessary and appurtenant thereto, it became part and parcel of the homestead: *Fitzell v. Leaky*, 72 Cal. 477, 46 Pac. 198. No part of the entire property can be subjected to execution in the absence of a showing that it exceeds in value the statutory exemption. The homestead was not abandoned as to any portion of the desert claim by the deed of the plaintiff to his wife in her lifetime of the pre-emption claim. For section 1243 of the Civil Code provides: "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married." A deed by the husband alone is not a grant executed and acknowledged by the husband and wife: *Freiermuth v. Steigleman*, 130 Cal. 392, 80 Am. St. Rep. 138, 62 Pac. 615.

Nor did any subsequent deed of the husband of any moiety or part of any portion of the entire property have the effect to abandon or nullify the homestead exemption as against the execution in question. When the wife died, the homestead, so far as it related to the desert claim, having been selected from the community property, vested absolutely in the surviving husband, the plaintiff herein, and it continued free and exempt from all previous debts, including plaintiff's debt theretofore incurred to the bank: Code Civ. Proc., sec. 1474. The sale by him of any interest, joint or several, in any part or parcel of the property thereafter could have no effect upon his right to claim this exemption. He had the right thereafter to deal with the property

any way he chose without regard to his previous debts. So far at least as those previous debts were concerned, the property was exempt, and no sale ⁴³² of any mere interest in the property could waive that exemption, and of course his grantees took title from him free from all lien or liability against the property on account of such debts. The cases like *Carroll v. Ellis*, 63 Cal. 440, in which it has been held that a homestead should be treated as abandoned where the husband and wife joined in a deed of an undivided interest in the property to a third person, are not governed by the same principle as this case. In those cases both spouses were living and joined in the deed. Here one of the spouses was dead, and the deed of the undivided interest was made by the surviving spouse alone. As said in *Dickey v. Gibson*, 113 Cal. 31, 54 Am. St. Rep. 321, 45 Pac. 16: "By the death of the first wife the homestead property vested absolutely in the surviving husband, Samuel Gibson. As far as the legal title is concerned, it vested in him as fully and perfectly as though no homestead had ever been carved out of it. The limitations and immunities which accompanied the enjoyment of the property under such title modified, not the title, but its enjoyment, and were only such as the statute imposed." The interest of plaintiff in the property, after his wife's death, became something different and greater than it was in her lifetime. He had then not only the absolute title, but also the absolute right of exemption in the property from all former debts, as well as the right to dispose of it in any way he saw fit.

By reason of their claims against plaintiff the defendants had no interest whatever in the property, as it was absolutely exempt from such claims. They could not be injured nor could any right of theirs be prejudiced by any disposition that the plaintiff might see fit to make of the property. Therefore, there is no good reason for extending the doctrine of those cases which hold that a homestead cannot affect an undivided interest in land, and that a subsequent sale of such interest is an abandonment of the homestead, to a case like this where the undivided interest has not been conveyed until after the death of one of the spouses, and the whole title to the homestead has "vested absolutely" in the survivor.

The facts found are sufficient to warrant a decree as demanded by plaintiff.

The appeal of defendants. From what has already been said it is apparent that the interest in the desert claim conveyed ⁴³³ to Jenks was at all times, and still is, exempt from defendants' judgment.

The appeal of defendants should be dismissed. The judgment should be reversed upon plaintiff's appeal, and the court below should be directed to enter a decree upon the findings forever enjoining and restraining the defendants from selling any portion of the property under the judgment or execution in question.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the appeal of defendants is dismissed, the judgment is reversed upon plaintiff's appeal, and the court below directed to enter a decree upon the findings forever enjoining and restraining the defendants from selling any portion of the property under the judgment or execution in question.

Henshaw, J., Lorigan, J., Shaw, J.

What Property may be the Subject of a Homestead is discussed in the monographic note to Pryor v. Stone, 70 Am. Dec. 344-353. It has been held that capital stock of a ditch company is not exempt from levy and sale on the ground that the ditch is used to convey water to land entered under the homestead laws: Struby-Estabrook Mercantile Co. v. Davis, 18 Colo. 93, 36 Am. St. Rep. 266.

The Abandonment of Homesteads is the subject of a recent extended note to Burkhardt v. Walker, 102 Am. St. Rep. 388-412.

ESTATE OF SEAMAN.

[146 Cal. 455, 80 Pac. 700.]

WILLS—Statutory Requirements must be Complied with.—The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only on compliance with the requirements of the statute. The mode prescribed is the measure for the exercise of the right, and an heir can be deprived of his inheritance only by compliance with this mode. (p. 55.)

WILLS, Execution of, Intention of the Testator.—For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the courts can consider only the purpose of the legislature as expressed in the language of the statute, and whether the will, as presented, shows a compliance with the statute. (p. 55.)

WILLS.—The Provision that a Will must be Subscribed at the End Thereof Requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. (p. 57.)

WILLS.—The Requirement that the Testator's Name shall be Subscribed at the End of a Will is not Satisfied by having that

name written at any place after the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. His name need not be written in immediate juxtaposition with the concluding words of the instrument, but it must be so near thereto as to afford a reasonable inference that he thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purpose. (p. 57.)

WILLS.—The Purpose of a Statute in Requiring the Testator's Signature to be Subscribed at the End of a Will is not only that it may thereby appear on the face of the instrument that the testamentary purpose therein expressed is completed, but also to prevent any opportunity for fraud or interpolations between the written matter and the signature. (p. 58.)

WILLS, Failure to Subscribe at the End—Absence of Fraud.—Where the subscription of a testator to his will is not at its end, it is not material that there is no fraud shown or charged. (p. 59.)

WILLS, Extrinsic Evidence of Intention to Execute.—Whether a testator intended to execute a will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. If he subscribed at a place which, as a matter of law, is not at the end of a will, such evidence is not admissible to prove that he intended to subscribe it at the end. (p. 60.)

WILLS, What not Subscribed by Testator at the End.—A document purporting to be a will written upon a printed blank of four pages having an unfilled attestation clause on the third page and of which the fourth page is only a blank space for the indorsement when filed, and which is signed by the testator's name, and that of two witnesses beneath the scrivener's title and blank form for dating and filing, is not subscribed at the end, and cannot be admitted to probate under a statute requiring every will, other than nuncupative or holographic, to be subscribed at the end thereof by the testator, in the presence of two attesting witnesses, each of whom must, in his presence and at his request, sign his name as a witness at the end of a will. (p. 60.)

Phil Bruton, for the appellants.

George R. Lovejoy, G. V. Martin, N. A. Hawkins and E. M. North, for the respondents.

⁴⁵⁸ The COURT. A document purporting to be the last will and testament of Henry Seaman, deceased, was presented to the superior court, and an application for its probate was denied upon the ground that it had not been properly executed, in that the name of the testator was not subscribed at the end thereof. From the judgment thus entered the present appeal has been taken.

The instrument was written upon a printed form or blank consisting of four pages folded in the middle like ordinary legal cap. Upon the upper portion of the first page was a ⁴⁵⁹ printed heading and introduction, occupying about one-fourth of the page; in the printed form the remainder of that page and the

entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and about one-fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of an executor, and a clause revoking all former wills, and immediately after this a testimonium clause, underneath which, and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page are blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded, and at the top thereof, were the printed words: "The Last Will And Testament of," under which the scrivener had written "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this—the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written "Henry Seaman," and underneath his name the word "witness" and underneath that the names "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank.

It was shown at the hearing that the decedent had written his name at that place in intended execution of his will, and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. It was also shown that, with the exception of these signatures, the instrument is in the same condition as it was when the decedent signed his name thereto.

The right to make a testamentary disposition of one's property is purely of statutory creation, and is available only upon a compliance with the requirements of the statute. The formalities which the legislature has prescribed for the execution of a will are essential to its validity, and cannot be disregarded. The mode so prescribed is the measure for the exercise of the right, and the heir can be deprived of his ⁴⁶⁰ inheritance only by a compliance with this mode. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the court can consider only the intention of the legislature, as expressed in the language of the statute, and whether the will as presented shows a compliance with the statute: Estate of Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460.

Section 1276 of the Civil Code requires every will other than nuncupative or holographic to be "subscribed at the end thereof," by the testator in the presence of two attesting witnesses, each of whom must in his presence and at his request sign his name as a witness "at the end of the will." This section is from the Revised Statutes of New York, adopted by that state in 1830. These provisions were incorporated into the Civil Code prepared for adoption by that state by David Dudley Field, and in their report of a Civil Code to the legislature of 1871, the code commissioners of this state refer to this code as the source of the section. In considering the section the decisions of that state upon the same question are therefore entitled to great consideration. A similar statute was enacted in England in 1837 (Stats. 1 Vict., c. 26), but the decisions under that statute as to what constitutes the "end" of a will are inconsistent and contradictory. In the earlier cases the statute received a very liberal construction in reference to the amount or extent of blank space that might be left between the termination of the will and the signature of the testator, but afterward the same judge who gave this construction (as did also the privy council in affirming his judgment) stated that he felt it necessary to construe the act more strictly, on the ground that the provision was intended to prevent any addition being made to the will after the deceased had executed it (*Smee v. Bryer*, 1 Rob. Ecc. 616; *Williams on Executors*, *67); and the statute was therefore construed as requiring the name to be written immediately after the termination of the testamentary provisions, without any space whatever between them. It was in view of these different constructions of the statute that, in 1852, parliament passed an explanatory act (Stats. 15 Vict., c. 24) known as "Lord St. Leonard's Act," which provided that the will ⁴⁶¹ should be valid "if the signature be so placed at or after or following or under or beside or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will," and that no such will should be affected by the circumstances that "a blank space shall intervene between the concluding end of the will and the signature," etc.; thus permitting an inquiry into the intention of the testator, contrary to the rule on that subject in this state. The provisions of this act are so directly opposed to section 1276 of the Civil Code, that the decisions thereunder are not entitled to any consideration in interpreting the section: *Estate of Walker*, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L.

R. A. 460. See, also, *Matter of Conway's Will*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796.

The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The "will" at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the "end thereof" is not the foot or physical end of the sheet of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will. "The act of authentication must take place at the termination of the testamentary disposition": *McGuire v. Kerr*, 2 Bradf. 244. "To say that where the name is there is the end of the will is not to observe the statute. That requires that where the end of the will is there shall be the name. It is to make a new law to say that when we find the name there is the end of the will. The instrument offered is to be scanned to learn where is the end of it as a completed whole, and at the end thus found must the name of the testator be subscribed": *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of O'Neil's Will*, 91 N. Y. 522; *Matter of Andrews' Will*, 162 N. Y. 1, 76 Am. St. Rep. 294, 56 N. E. 529, 48 L. R. A. 662.

The requirement that the name shall be subscribed "at" the end of the will is not satisfied by having that name written at any place "after" the termination of the written matter, ⁴⁶² irrespective of the relation which such place bears to the concluding portion of the will. This provision does not, however, of necessity require that it shall be in immediate juxtaposition with the concluding words of the instrument, but that it shall be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute. While a slight space, such as a single line, or even more, might be left blank between the written matter and the name without impairing the validity of the will, yet to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from

ignorance or intention, which should prevent its admission to probate: See *Soward v. Soward*, 1 Duvall (Ky.), 126.

Appellants have cited the case of *Gilman's Will*, 38 Barb. 364, in which the written matter of the will terminated four lines above the bottom of the page where the testator signed his name, and in which the court said: "An instrument is signed at the end when nothing intervenes between the instrument and the subscription. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs." This language may have been appropriate to the will then before the court, but as a construction to be given to the statute it does not meet with our approval, and is moreover inconsistent with the construction given in the above cases cited from the court of appeals of that state. Particularly do we dissent from the definition of "end" as given in the last sentence of the quotation.

The formalities which the legislature has prescribed for the execution of wills are to provide against false and fraudulent wills, and to afford means of determining their authenticity. A very evident purpose of requiring the testator's name to be subscribed at the end of the will is not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a ⁴⁶³ completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature: *McGuire v. Kerr*, 2 Bradf. 244; *Matter of O'Neil's Will*, 91 N. Y. 516; *Matter of Andrews' Will*, 43 App. Div. 394, 60 N. Y. Supp. 141, affirmed 162 N. Y. 1, 76 Am. St. Rep. 294, 56 N. E. 529, 48 L. R. A. 662; *Matter of Hewitt's Will*, 91 N. Y. 261; *Matter of Conway's Will*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796; *Soward v. Soward*, 1 Duvall (Ky.), 126; *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Wineland's Appeal*, 118 Pa. St. 37, 40 Am. St. Rep. 571, 12 Atl. 301. "The statutory provision requiring the subscription of the name to be at the end is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions" (*Sisters of Charity v. Kelly*, 67 N. Y. 409); "or by judicial construction" (*Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616, 47 N. E. 272); "or defeated by lax interpretation" (*Glancy v. Glancy*, 17 Ohio St. 134). "The purpose of the law which requires the subscription to be at the end of the will is to prevent fraudulent additions to a will be-

fore or after its execution, and the statute should be so construed as to accomplish this purpose": *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156.

It is immaterial that there is no charge of fraud in any particular case. A failure to comply with the formalities required by a statute enacted for the prevention of fraud is not excused by showing that in the particular case under consideration there was no fraud. The statute in question was enacted to protect the wills of the dead from alteration. If opportunity for such alteration is permitted the fraud may be so deftly accomplished as to prevent its discovery, and for this reason the construction to be given the statute should be such as will control the execution of all wills. "The legislative intent was doubtless to guard against fraud and uncertainty in the testamentary disposition of property by prescribing fixed and certain rules by which to determine the validity of all instruments purporting to be wills of deceased persons": *Matter of O'Neil's Will*, 91 N. Y. 520.

It is true, as suggested by the appellant, that there is the same opportunity for fraudulent interpolations in the will if the testator should leave sufficient space therefor between the ⁴⁰⁴ several items of his will. But it is a sufficient answer to this suggestion that the form in which the provisions of a will are drafted is no part of its execution, and that the legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be "executed and attested": See *Heady's Will*, 15 Abb. Pr., N. S., 211; *Matter of Collins*, 5 Redf. (N. Y.) 20. In *Estate of Blake*, 136 Cal. 306, 89 Am. St. Rep. 135, 68 Pac. 827, the testator left a blank space of several lines between the items in which he disposed of his property and the items appointing an executor and revoking his former will. These last items were, however, testamentary provisions (*Sisters of Charity v. Kelly*, 67 N. Y. 415), and as they constituted a part of his will the end thereof was not reached until they had been written upon the paper, and as his name was subscribed to the testamentary clause which immediately followed these items it was held that it was subscribed at the end of the will.

A question similar to the one involved herein was presented in *Soward v. Soward*, 1 Duvall (Ky.), 126. The statute of Kentucky required the witnesses as well as the testator to "subscribe" the will with their names, which the courts of that state

construed to mean that they should write their names at the close of the will. In the will then before the court the witnesses wrote their names, as did the testator in the present case, on the outside or fourth page of the sheet after it had been folded, and across it as so folded. The court held that this was not a compliance with the statute, saying: "So far from subscribing their names to the will, it may be said with much more propriety and accuracy of speech that they merely indorsed the paper enveloping and inclosing the will without any accompanying writing or memorandum to indicate the purpose of the indorsement, or showing any connection whatever between the indorsement and the will." In *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696, the sheet of paper upon which the will was written was folded in the form of a letter and the words "David M. Roy's Will" were indorsed upon the back in the handwriting of the deceased at about the middle of the third page when the paper was unfolded. His name was not signed at the end of the writing. ⁴⁰⁵ The court held that it was not entitled to probate, saying: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case." The same rule was followed in *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775, and *Patterson v. Ransom*, 55 Ind. 402.

Whether the deceased intended to execute his will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. Parol evidence cannot be admitted to show that a testator intended the space signed by him to be the end of the will, if upon an inspection of the instrument it appears that it is not in fact at the end. Evidence will not be received for the purpose of showing that he intended to comply with the requirements of the statute if it appears upon the face of the instrument that he had not in fact so complied. It must appear upon the face of the will itself that its physical execution is in accordance with these requirements: *Matter of Hewitt's Will*, 91 N. Y. 261; *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843, 6 L. R. A. 775; *Patterson v. Ransom*, 55 Ind. 402.

Under these considerations it must be held that the testator did not comply with the requirements of the statute in the execution of his will, and the judgment of the superior court is therefore affirmed.

BEATTY, C. J., Concurring. I concur, and desire only to note a point strongly urged in the argument of counsel for appellants, but not specially adverted to in the opinion of the court. He insists that section 1276 of the Civil Code, like the rest of its provisions, must be liberally construed "with a view to effect its objects and promote justice": Civ. Code, sec. 4. I fully agree with him on this proposition, but I apply it differently. His argument is in effect that we should give a liberal construction to wills which deviate from the statute in the mode of their execution for the purpose of sustaining them, whereas a proper application of the principle requires us to give a liberal construction and full effect to every provision of the statute designed to prevent the probate ⁴⁶⁶ of spurious wills, although in so doing we may in a particular instance defeat an honest attempt on the part of a decedent to make a testamentary disposition of his estate. The evil of occasionally defeating such an attempt is far less serious than the establishment of a precedent which would open the door to the frauds which the statute was designed to prevent. Every statute of frauds is designed to promote justice by requiring wills and contracts to be executed with such formalities and indicia of genuineness as to make simulated and fraudulent writings of the classes defined impossible, or at least very difficult. Such statutes in the long run promote justice—which is their sole object—by shutting out opportunities of fraud. Where they defeat one honest purpose they prevent unnumbered frauds, which in their absence would be feasible and measurably safe. It would not, therefore, be a proper application of the principle invoked to weaken by construction the requirements of our statute prescribing the requisites of a valid will. By so doing we should no doubt be dealing most liberally with the efforts of decedents who have disregarded the law, but we should not be construing the law liberally to effect its objects. And unless we are to set ourselves up as better judges of the true policy of the law than the legislature, we should not be promoting justice.

As our law now stands, two witnesses are sufficient, so far as witnesses are concerned, for the due authentication of a will. Suppose that the law should be so changed as to require three witnesses, and suppose a will offered for probate attested by two only. If they were perfectly trustworthy witnesses everyone might be entirely satisfied of the genuineness of the instrument, but could any court admit it to probate? Our law does not require three witnesses, but in place of a third witness

it requires something else which itself is a test of authenticity—viz., the signature of the alleged testator at the end of the will, and this can no more be dispensed with than the third witness if three witnesses were required.

In determining what is the end of a particular will no doubt the principle of liberal construction may be applied, but even liberality has its limits. Counsel for appellants is, it is true, able to cite us to a number of cases which contain his ⁴⁶⁷ contention that a signature is at the end of a will, no matter how far from the end of the writing, if it is not followed by any dispositive clause. I think, however, that the cases which hold otherwise, and especially the New York cases, are supported by the better reason. The true test to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence aliunde, to see whether it is apparent that his name was placed where it appears for the purpose of execution.

Applying that test in the present instance, it is very far from being apparent to me that the name of Henry Seaman was indorsed on the back of this will for the purpose of executing it. In the course of my experience I have seen hundreds of wills, deeds, and other written contracts; I have frequently seen the names of the parties indorsed on the back of such papers before execution, and I cannot recall a single instance in which any of such documents was so indorsed for the purpose of executing it. The testimony in this case shows that in fact Henry Seaman attempted to execute his will in that way, but this testimony cannot be considered for the purpose of determining whether the statute has been complied with. And, indeed, what the testimony shows is that he wrote his name on the back of the paper because of his opinion that his signature at the end of the will was not necessary. It is unfortunate to the intended objects of his bounty that he was not better informed, but it would be more unfortunate if the courts out of sympathy for them should relax the wholesome stringency of the law governing the authentication of wills.

ANGELLOTTI, J. I concur. I am of the opinion that the true test by which to determine whether the requirement of our law that the testator shall subscribe his name at the end of the will has been complied with, and the will, therefore, in that respect executed, is as stated in the concurring opinion

of the chief justice. To comply with the statute, the name must, of course, be subscribed after the termination of the testamentary provisions, and where it is so placed the mere extent of space between such termination and the subscription ought not to affect the question as to whether the statute⁴⁶⁸ has been complied with, if the document on its face, disregarding the signatures of the witnesses and all evidence aliunde, fairly indicates that the name was so placed by the testator as a subscription and for the purpose of execution. The extent of space is, of course, material upon the question as to what the document does indicate upon its face.

The document in question does not measure up to this requirement.

Shaw, J., concurred.

The Effect of the Failure of a Testator to subscribe his name at the end of his will is discussed in Matter of Andrews, 162 N. Y. 1, 76 Am. St. Rep. 294; Matter of Whitney, 153 N. Y. 259, 60 Am. St. Rep. 616; Will of Booth, 127 N. Y. 129, 24 Am. St. Rep. 429; Succession of Armant, 43 La. Ann. 310, 26 Am. St. Rep. 183; Wine-land's Appeal, 118 Pa. St. 37, 4 Am. St. Rep. 571.

WELCH v. CROSS.

[146 Cal. 621, 81 Pac. 229.]

CONSTITUTIONAL LAW—Obligation of Contracts.—All the Laws of a State at the Time a Contract is Made which affect the rights of the parties thereto enter into and become a part of it as if referred to or incorporated therein. (p. 65.)

CONSTITUTIONAL LAW—Obligation of Contracts.—The Remedy, Where It Affects Substantial Rights, is included within the term "obligation of contracts," and cannot be altered so as to materially impair that obligation. (p. 65.)

CONSTITUTIONAL LAW.—In the Obligation of a Contract is Included the Means of Its Enforcement. (p. 65.)

EXECUTION, Amendment to Statute Relating to, Nonretroactive Effect of.—An amendment of a statute, extending the time within which redemption may be made from execution sales is not applicable to sales under judgments rendered before its passage. (p. 66.)

CONSTITUTIONAL LAW—Obligation of Contract.—A Statute Extending the Time Within Which Redemption may be Made from Execution Sales, if applied to pre-existing judgments, diminishes the right of the creditor and creates a greater estate in the debtor. Its object is to give the latter greater rights than he had before, and this cannot be done without taking such rights from the creditor. (pp. 67, 68.)

EXECUTION SALES, Constitutionality of Statute Extending Time to Redeem from.—A statute extending the period within which to redeem from execution sales from six months to one year cannot be applied to subsequent sales under judgments rendered prior to its enactment without impairing their obligation in the manner prohibited by section 10 of article 1 of the constitution of the United States, and section 16 of article 1 of the constitution of California. (p. 71.)

Franklin P. Bull and L. A. Wittenmyer, for the appellant.

Roger Johnson, for the respondent.

⁶²³ COOPER, C. A demurrer was sustained to the complaint and judgment entered for defendant, from which the plaintiff has appealed. A judgment was recovered in June, 1896, against plaintiff upon his promissory note made in 1892, and on the judgment a writ of execution was issued and levied upon the lands described in the complaint, which were regularly sold thereunder in October, 1900. At the time the promissory note was executed, and at the time the judgment was rendered, the judgment debtor was allowed, under section 702 of the Code of Civil Procedure, six months after sale in which to redeem real estate from a sale thereof under execution. In February, 1897, after the entry of judgment, but before the levy of sale, the section of the code was amended so as to allow the judgment debtor twelve months in which to redeem.

In October, 1900, the defendant became the purchaser of the property at the sheriff's sale under a writ of execution, issued upon the judgment, and after the expiration of six months, the sheriff executed a deed to him. After the execution of the deed, and before the expiration of the year, plaintiff offered to redeem by paying the amount of the purchase price and interest thereon as fixed by the statute, and now seeks by this action to be allowed to redeem by paying the amount of the judgment and interest according to the statute of February, 1897. The question for determination is whether the judgment debtor's right to redeem is governed by the law in effect when the contract was made and the judgment obtained or by the law now in force. Does the statute, as amended in February, 1897, apply to contracts made, upon which judgments had been obtained, at the time it was so amended? If it does, then plaintiff had the right to redeem; ⁶²⁴ but if it does not, then the judgment of the court below is correct.

It is provided in section 10 of article 1 of the constitution of the United States that no state shall pass any law "impairing the obligation of contracts," and in section 16 of article 1

of the constitution of the state of California that the legislature shall pass no "law impairing the obligation of contracts." The language of the two constitutions is not ambiguous nor doubtful. Any law which impairs the obligation of a contract is prohibited. The restriction is not aimed solely at laws which expressly destroy or annul contracts, or in a certain degree impair their obligation, but it applies to all laws which in any substantial degree impair the obligation of contracts. The question as to whether or not a law impairs the obligation of a contract is not always of easy solution. The provision of the constitutions quoted, in its varied applications, has been the subject of more learning and discussion in the courts of the states and of the United States than perhaps any other constitutional provision. It is settled that all the laws of a state existing at the time a contract is made which affect the rights of the parties to the contract enter into and become a part of it, and are as obligatory upon all courts which assume to give a remedy on such contracts as if they were referred to or incorporated in the terms of the contract: *Von Hoffman v. City of Quincy*, 4 Wall. 550, 18 L. ed. 803; *Brine v. Insurance Co.*, 96 U. S. 627, 24 L. ed. 858. The remedy, where it affects substantial rights, is included in the term "obligation of a contract," and the remedy cannot be altered so as to materially impair such obligations: *Green v. Biddle*, 8 Wheat. 75, 5 L. ed. 547; *Edwards v. Kearzey*, 96 U. S. 600, 24 L. ed. 793. In the latter case it is said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest."

When the judgment was obtained against plaintiff it became a lien upon all his real estate, and the law of the land gave his creditor the right to have execution issue thereon, and under ~~625~~ said execution to levy upon and sell any real estate of the plaintiff, the title at such sale to become absolute unless redemption be made within six months. The law as afterward amended, if applicable to judgments obtained before its passage, would take away this right, deprive the creditor of the right to sell a title which would become absolute at the end of six months, and vest in the plaintiff an equitable estate for

another six months. The right to sell property so as to convey an absolute title and the immediate right of possession is more valuable than the right to sell it on condition that the title shall vest at some future time. It is evident that the longer the time for redemption before the purchaser can acquire a title the less valuable the property would be to the purchaser. If ten years were given in which to redeem, there would, we apprehend, be few purchasers, and if one hundred years were given, the right to sell land would be a right without value and of no assistance to the creditor. If the legislature can extend the right to redeem from execution sales after the judgment has been obtained for a period of six months, it could extend it for twelve months, or for many years. The difference would only be one of degree. In one case the obligation of the contract would be impaired in a less degree than in the other. But the constitution says it shall not be impaired at all. We think the safer rule is to hold that the amendment is not applicable to an execution sale made upon a judgment rendered before its passage, instead of trying to distinguish the case by discussing the degree in which the contract was impaired. If the legislature desires to change the period of redemption from execution sales from time to time, it is better policy to hold that such change shall not be retroactive, but shall only be applicable to judgments rendered after such amendment. The law as read into the contract at the time it is made should govern in its enforcement. The question in various aspects has been before the supreme court of the United States several times.

In *Greene v. Biddle*, 8 Wheat. 1, 5 L. ed. 547, where the constitution of Kentucky provided that all private rights and interests to certain lands should remain secure and valid under existing laws, it was held that a law passed by the legislature of Kentucky relieving the occupant of lands from damages for its wrongful detention and requiring the owner to pay the occupant ⁶²⁶ for his improvements was unconstitutional. It was there said: "If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged, but it is impaired and rendered insecure, according to the nature and extent of such restrictions." In *McCracken v. Hayward*, 2 How. (U. S.) 608, 11 L. ed. 397, after the plaintiff had recovered a judgment the legislature of the state of Illinois passed an act providing that a sale of property should not be made under execution unless it should

bring two-thirds of its value as appraised by certain householders. The act was held to impair the obligation of the contract. In that opinion it is said: "The obligation of a contract consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; where it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies there in force. If any subsequent law affects to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other. Hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution. The right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. Any subsequent law which denies, obstructs or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement or ⁶²⁷ any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case, as the other, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. No agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts; the express power which a mortgagor confers on the mortgagee to sell as his agent is not more potent than that which the law delegates to the marshal to sell and convey the property levied on under an execution."

The law as stated in the above case is decisive of this. The amendment diminished the right of the creditor; it created a

greater estate in the debtor. Its object was to give the debtor greater rights than he had before, and he cannot be given rights that he did not have when the judgment was obtained, without such rights being taken from the creditor.

In *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 12 L. ed. 447, the court held that an act of the legislature of the state of Mississippi prohibiting any bank from transferring, by indorsement or otherwise, any note, bill receivable, or other evidences of debt, impaired the obligation of contracts as to the note and bill receivable held by the bank at the date of the passage of the act. The court said: "What law existed on this point when the note was actually transferred is not the inquiry, but what existed when it was made and its obligations as to a contract were fixed."

In *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, on error from the supreme court of North Carolina, it appeared that when the debts or obligations were contracted, the exemption laws of the state allowed as exempt such property as freeholders appointed for the purpose might deem necessary for the comfort and support of the debtor's family, not to exceed fifty dollars in value, and fifty acres of land not to exceed five hundred dollars in value. The constitution of 1868 provided for exempting five hundred dollars' worth of personal property and a homestead not to exceed one thousand dollars in value. It was held that the constitution could not impair the obligation of a contract which existed at the time of its adoption. In that case there was no judgment at the time of the adoption of the constitution, but the contracts existed. The rule is thus ⁶²⁸ stated in the opinion: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void."

In *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190, 30 L. ed. 1161, the relator had obtained an ordinary money judgment against the county at a time when a state law gave him the right to have a tax levied to enforce it. Before he could collect it the law was repealed. The United States circuit court granted him a mandamus to compel the levy, and the supreme court affirmed the judgment, holding that the right to have the tax levied was a vested right that could not be taken away by repeal.

In the late case of *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, 41 L. ed. '93, the principle is fully discussed, and it is held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. The court after citing many cases said: "It seems impossible to resist the conclusion that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract." This is quoted by Freeman in his work on Executions (third edition, volume 3, section 315), and the author says: "It is true that the decisions of the national courts have been only in cases involving the application of the law to debts secured by mortgage. We do not, however, understand that the fact that the debt was secured gives it any additional obligation or inviolability. It merely selects specific property out of which payment might be coerced, notwithstanding any subsequent transfers or encumbrances by the mortgagor. Where the debt is unsecured the creditor still has the right to sell under execution any property of the debtor subject to sale, and a statute creating or extending the right to redeem operates to impair the obligation of the contract to the same extent as if the debt were secured by specific property." This court has followed the case of *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, 41 L. ed. 93, in the late cases of *Savings Bank of San Diego v. Barrett*, 126 Cal. 629 417, 58 Pac. 914; *Haynes v. Tredway*, 133 Cal. 400, 65 Pac. 892; *Malone v. Roy*, 134 Cal. 344, 66 Pac. 313.

In the above case of *Haynes v. Tredway*, the subject is fully discussed, and the court said: "In another form it may be said that the agreement of the mortgagor was that the purchaser at the sale should have title to the property subject to a right of possession thereafter in the mortgagor for six months. That was the contract in this case, and the necessary result of giving the amended statute effect here is to give the mortgagor the right to the possession of the property for twelve months after the sale. It is thus patent upon its face that a statute extending the right of possession in the mortgagor for a period of twelve months is a substantial impairment of the obligation of a contract limiting the right of possession to six months."

Upon what principle could it be said that where the parties create a specific lien upon real estate an extension of the

period of redemption impairs the obligation of the contract, but that where they create a general lien upon such real estate it does not impair the obligation of the contract? If a debtor is the owner of a single lot or tract of land, the lien of the creditor by judgment thereon is, in most cases, as valuable to him as if he had a lien thereon by mortgage. And the later decisions of this court are in accord with its earlier ones. In the case of *People v. San Francisco*, 4 Cal. 127, the opinion states that the case had attracted more attention and deeper interest than any that had ever come before the court. Four counsel on each side were heard in argument, and it was held in an able opinion that a law as to redemption did not apply to judgments existing at the date the law was passed. The court said: "By the change of the law the right of absolute sale is taken away and a provision substituted which not only hinders and delays him in recovering his money, but renders him insecure in the hope of it, and might in many instances totally destroy his rights by nullifying them. It is said that a substantial remedy is left, but if the legislature can delay payment by limitation or exemption laws for six months they could do it for six years. Hence the cautious apprehensions of the sages of the law who tell us that such a construction would be pregnant with mischief and liable to abuse. The highest authorities among American jurists and the most ⁶³⁰ learned expounders of the federal constitution concur in the rule that the suspension by statute of remedies or any part thereof existing when the contract was made is more or less impairing the obligation of the contract. It is said that the authorities only apply to those cases where the remedy is denied. Such is not the language of the constitution—it says impaired." The case was followed in *Seale v. Mitchell*, 5 Cal. 402. These two early cases were apparently departed from in *Tuolumme Redemption Co. v. Sedgwick*, 15 Cal. 517, and *Moore v. Martin*, 38 Cal. 428.

Without discussing the two latter cases, it is sufficient to say that we think the three cases cited following *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, 41 L. ed. 93, are in accord with the earlier cases and practically overrule the cases cited from 15 and 38 Cal. The rule, which we have attempted to show is the correct one, was applied to an act as to redemption of real estate from execution sales, and held not to affect contracts made before its passage: *Collins v. Collins*, 79 Ky. 88. For a further discussion of the subject, in accordance with what has been said,

see *Swineburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489; *Scobey v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490, and note; *Blair v. Williams*, 4 Litt. 35; *State v. Sears*, 29 Or. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808, and note.

The latter decision was rendered by the supreme court of Oregon on rehearing after the decision in *Barnitz v. Beverly*. It is reported in 54 Am. St. Rep. 808 and in a note to the case, referring to *Barnitz v. Beverly*, it is said: "The decisions in the state courts respecting the constitutionality of statutes purporting to give to debtors a time within which to redeem from execution or foreclosure sales, where no previous right of redemption existed, or in the case of the previous existence of the right extending the time within which it might be exercised, were very evenly divided. Thus the constitutionality of such statutes were affirmed in *Moore v. Martin*, 38 Cal. 428; *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, 42 Pac. 725, 31 L. R. A. 74; *State v. Gilliam*, 18 Mont. 94, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556, and denied in *People v. San Francisco*, 4 Cal. 154; *Watkins v. Glenn*, 55 Kan. 417, 40 Pac. 316; *Wilder v. Campbell*, 4 Idaho, 695, 43 Pac. 677 but the decisions in denial made in California and Kansas were overruled by subsequent decisions made in the same states. It now appears, however, that the earlier decisions in ⁶³¹ both states were correct." After the decision in *Barnitz v. Beverly* a rehearing was granted by the supreme court of Montana and a judgment rendered in accordance therewith: 18 Mont. 109, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556.

We therefore conclude that the statute extending the time for redemption does not apply to judgments existing at the time of its passage and that the judgment should be affirmed.

Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Shaw, J., Van Dyke, J., Angellotti, J.

On petition for rehearing in Bank the court in Bank rendered the following opinion June 2, 1905:

SHAW, J. In a petition for rehearing the appellant cites the recent decision of the supreme court of the United States in *Hooker v. Burr*, 194 U. S. 415, 24 Sup. Ct. Rep. 786, 48 L. ed. 1046, and insists that it is contrary to the views stated in the opinion of Commissioner Cooper herein. The case was not cited

in the briefs of counsel upon which the case was submitted, nor referred to in the opinion. Upon an examination of the opinion in that case I am satisfied that it is not decisive of the case at bar.

It involved the validity, as against a purchaser at a foreclosure sale, of a law enacted after the execution of the mortgage and before the decree of foreclosure, reducing the rate of interest on the purchase money to be paid by a redemptioner from two per cent a month, as previously allowed, to one per cent a month: Stats. 1895, p. 225. The opinion also refers to another law of this state (Stats. 1897, p. 41), increasing the time allowed for redemption from six to twelve months, which is the law here in question; but as the redemption there involved was in fact made within six months, the validity of this law was not in issue. The suit was by the purchaser to compel the sheriff to execute to him a deed pursuant to the sale, notwithstanding the payment of redemption money with interest at one per cent a month. The decision is to the effect that the law was valid against such purchaser. The ground of the decision is, that the purchaser is not a party to the contract of mortgage, and cannot invoke the constitutional ⁶³² protection afforded to it, but that his contract regarding the right to redeem was a contract made under the law in force at the time of the sale. The court says: "Upon principle, we cannot see how an independent purchaser, having no connection with the mortgage, excepting as he became such purchaser at the foreclosure sale, can raise the question in his own behalf in relation to the validity of legislation as to redemption and rate of interest which existed at the time he made his purchase. . . . In our view the independent purchaser must, under the facts herein, abide by the law as it stood at the time of his purchase."

If this proposition is to be taken as broadly as the language would warrant, it would, of course, apply to all sheriff's sales, and to all laws affecting them, so far as the rights of purchasers thereunder are concerned, and as the relation of the defendant herein to the case is that of a purchaser only, it might be said that his rights depend on and are measured by the law in force when he purchased. The language of the decision must, of course, be interpreted with reference to the particular law there considered. So understood, I do not think it can be applied to the law here in question. It must be conceded, in view of the fact that it has been so decided by the United States supreme court, which is the paramount authority on such questions, that the law which prescribes the amount of interest on the purchase

money which must be paid to redeem land from a foreclosure or execution sale is the only law on which the purchaser can rely, and is the measure of his rights in that particular. It does not follow that the same is true of the law which fixes the period allowed after the sale within which the debtor may redeem and during which he may remain in possession of the land. The rights of the parties in regard to the land reach further back and must depend on the rights of the creditor. The purchaser must necessarily obtain all the estate of the debtor in the land which the creditor was empowered to sell. A power to subject property to sale which does not include the power to transfer to the purchaser all the estate sold is no power at all with respect to the estate not subject to such transfer. By the law which became part of his contract the creditor in this case was entitled, for the payment of his debt, to subject to sale the entire estate of the debtor in the land, save and except the ~~633~~ right of possession for six months. This right necessarily included the right to transfer all of this estate to the purchaser at the sale. The subsequent law, purporting to carve out of this estate and reserve to the debtor an additional term of six months, which is an estate for years, would clearly violate the obligation of the original contract. The purchaser obtains all the right of the creditor with respect to the property subject to sale. The case cannot be distinguished in principle from *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *Howard v. Bugbee*, 24 How. 461, 16 L. ed. 753; and *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1043, 41 L. ed. 93, which declare laws allowing or increasing the period of redemption invalid as to pre-existing mortgages, nor from *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397, and *Gantley v. Ewing*, 3 How. 707, 11 L. ed. 794, holding laws requiring the appraisement of property and prohibiting the sale thereof for less than a certain proportion of the appraised value invalid against previous contracts and *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, and *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212, establishing the same rule concerning laws providing a homestead or additional exemptions. In all such cases the creditor would obtain no benefit whatever from the constitutional provision in his favor if he could not by means of his legal process transfer to the purchaser the property, or estate therein, attempted to be withheld by the subsequent law.

BEATTY, C. J. The case of *Hooker v. Burr*, 194 U. S. 415, 24 Sup. Ct. Rep. 706, 48 L. ed. 1046, upon which petitioner so

confidently relies is not authority in this case because of the broad and vital distinction between a law extending the time of redemption from execution sales and a law reducing the rate of interest to be paid by a redemptioner. The former diminishes the estate which can be sold and necessarily impairs the security. If an independent purchaser cannot hold the entire estate subject to the mortgage or judgment lien the lienholder cannot sell the whole estate. No man will purchase and pay for what he cannot hold, and what no one will purchase has no salable value. The only possible method of securing the full rights of the lienholder is to uphold the title of his vendee to all that he is empowered by his contract or by the law to sell. But a law which merely reduces the rate of interest to be paid by a redemptioner, so far from impairing the security of a mortgagee ⁶³⁴ or judgment creditor, has the opposite effect. There are two classes of bidders at execution sales. One man desires to keep the property for use or as an investment for idle funds, and, it may be assumed, will offer its fair value if compelled to do so by the competition of other bidders. Another man has no desire to keep the property; his only object in bidding at the sale is to profit by the interest to be paid on a redemption. The competition of these two classes of bidders is of course advantageous alike to the execution creditor and to his debtor, and a law which induces either class to bid more nearly the fair value of the property than he otherwise would, so far from impairing the security, actually enhances it. I think it is demonstrable—assuming, as the fact is, that the current rate of interest on secured loans is less than twelve per cent—that a law which reduces the redemption rate from twenty-four to twelve per cent has a necessary tendency to induce one who is bidding with a view to redemption to bid higher than otherwise he would. For he cannot afford in any case to pay a sum which will make a redemption unprofitable to the execution debtor or a junior lienholder, and a simple illustration will show that he can afford to bid more nearly the fair value of the property when the redemption rate is twelve per cent than when it is twenty-four per cent. Suppose the property offered for sale to be fairly worth twelve hundred and fifty dollars; the man who is bidding solely with a view to a redemption cannot, if the rate is twenty-four per cent, afford to pay more than one thousand dollars, for at the end of a year the cost of redemption (twelve hundred and forty dollars) would be practically equal to the value of the property. Whereas, if the rate was twelve per cent he could bet-

ter afford to pay eleven hundred dollars, for at the end of the year the cost of redemption would be only twelve hundred and thirty-two dollars, leaving eighteen instead of ten dollars as the profit on redemption. Of course, it is not likely that so nice a calculation would or could often be made, but the illustration shows what the real tendency of a law reducing the redemption rate is. It redounds to the advantage of the parties to the contract and hurts no one but the speculative bidder, who is not in a position to complain.

This view reconciles the two lines of decision in this court and in the supreme court of the United States. A law extending the time of redemption is unconstitutional as to liens ⁶³⁵ accruing before its enactment because it impairs the security in which the creditor has a vested right. A law reducing the interest rate upon a redemption is not unconstitutional because it does not impair the security of the creditor or affect injuriously the interest of the debtor.

Rehearing denied.

The Constitutionality of Statutes purporting to give to debtors a time within which to redeem from execution or foreclosure sales where no previous right of redemption existed, or in the case of the previous existence of the right, extending the time within which it might be exercised, is discussed in the notes to *State v. Sears*, 54 Am. St. Rep. 808-811; *Scobey v. Gibson*, 79 Am. Dec. 494-496; and in the subsequent cases of *Thresher v. Atchison*, 117 Cal. 73, 59 Am. St. Rep. 159; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932. See, too, *Hooker v. Burr*, 137 Cal. 663, 99 Am. St. Rep. 17, and note.

HUMBOLDT LUMBER MILL COMPANY v. CRISP.

[146 Cal. 686, 81 Pac. 30.]

MECHANIC'S LIEN Where Property is Destroyed by Fire. Under the statutes of California, if, before a building is completed and delivered to the owner and before any claim for a lien is filed, such building is destroyed by fire without his fault, nothing remains upon which a mechanic's or materialman's lien can attach, and a suit cannot be maintained to enforce the lien against the land upon which the building stood or which was necessary for the convenient use and occupation thereof. (pp. 76, 77.)

Samuel Rosenheim and A. G. & H. K. Eells, for the appellant.

Adams & Adams, for Edward Crisp, respondent.

686 GRAY, C. This action was brought to enforce mechanics' liens upon three acres of land owned by defendant upon which a house in course of construction had been destroyed by fire, without any fault of the owner, before it was completed, and before the claim of lien was filed. The defendant had judgment, and the plaintiff appeals therefrom.

We are of opinion that under the peculiar language of our mechanic's lien law the lien has nothing to which it can attach if filed after the destruction of the building.

687 Section 1185 of the Code of Civil Procedure provides: "The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in said land, then only his interest therein is subject to such lien." If there is no building it will be impossible for the court to determine that any land "may be required for its convenient use." In this case it was essential that the findings should dispose of all questions as to the land that might be necessary for the convenient use of the building; and accordingly the court did find "that the said land is not, nor is any part thereof, required for the convenient use and occupation of the building for and upon which plaintiffs furnished labor and material."

This finding was the logical deduction from the other findings of the court to the effect that before the building was completed, before it was delivered to the owner, and before any lien was filed, it was destroyed by fire without any fault of defendant. In view of these findings and the above-quoted statute, the court could enter no judgment decreeing a lien upon any land. It would not fit the language of the code nor answer the requirements thereof to confine the findings to "such portion of the land as was necessary for the convenient use and occupation of the building designed," as contended by appellant; for the code says, "so much as may be required for the convenient use and occupation thereof." This language looks to an existing house that can be occupied in the future, and not to a vacant lot upon which no house exists.

In addition to the foregoing considerations our mechanic's lien law proceeds upon the theory that the laborer and materialman has an equitable right to follow his labor and material into the building of which it has become a component part and have a lien on the building because it contains in it such labor and material, and that it is not just that the owner should succeed to that labor and material without seeing to it ~~ess~~ that compensation is rendered therefor to the persons furnishing such labor and material.

In *Tuttle v. Montford*, 7 Cal. 358, it is said: "The lien of the mechanic, artisan and materialman is more equitable and more favored in law, because these parties have, at least in part, created the very property upon which the lien attaches."

In *Avery v. Clarke*, 87 Cal. 628, 22 Am. St. Rep. 272, 25 Pac. 921, it is said: "The principle upon which liens are allowed in favor of mechanics and materialmen is, that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of the land who has contracted with them for such improvement or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefor."

In *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860, it is said: "The owner is not made personally liable to the materialman, but his property is made liable for the material which he has actually received and retains in his building. This it seems to us is eminently just and right."

The decisions in this state seem to regard the benefit conferred upon the owner by placing the labor and materials in his building as the true consideration for conferring the right of lien upon the parties furnishing such labor and materials. It cannot be said that this consideration exists where, as in this case, the building is destroyed before completion and before delivery to the owner. Here the owner has not derived, and can never derive, any benefit from the labor and materials furnished.

A further reason why the lien should not apply to the land in this case is found in a consideration and comparison of sections 1183 and 1185 of the Code of Civil Procedure. The first of these sections gives a lien "upon the property upon which they have bestowed labor or furnished materials." The second section cited says that certain land "is also subject to the lien." In these provisions we see an intention of the

legislature to make the lien on the building the principal thing, and the lien upon the land on which it is situated an incident of the completion of the building, and that when the building is destroyed before completion, there can be no lien ~~ess~~ against the land on which it was being erected. "That the lien shared the fate of the building; and that the reason for binding the land ceases with the destruction of the building": Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893, and note, 60 N. W. 415; Presbyterian Church v. Stettler, 26 Pa. St. 246; Wigton & Brooks' Appeal, 28 Pa. St. 163; Civ. Code, sec. 3540.

The above and foregoing constructions of our mechanic's lien law also find support in the following well-considered cases: Coddington v. Hudson etc. Dry Dock Co., 31 N. J. L. 477; Wood & Co. v. Wilmington Conference Academy, 1 Marv. (Del.) 419, 41 Atl. 89; Holzhour v. Meer, 59 Mo. 434; Shine's Exr. v. Heimburger, 60 Mo. App. 174.

The courts of several of the states undoubtedly hold that the mechanic's lien extends to the land even though the building be destroyed before completion; but an examination of these cases discloses that in many instances they turn upon the peculiar language of the statute there under consideration, charging the land primarily with the lien. It will be unnecessary to review the cases from those states which adhere to the doctrine last referred to. It is sufficient to say that we concur in the reasoning of those cases cited from Pennsylvania and Wisconsin. The mechanic's lien statutes of these two states seem to accord most nearly with our own. There are, however, stronger reasons to be found in our statutes why the lien should not apply to the land, the building being destroyed, than are to be found in the statutes of any other state. One of these reasons is already adverted to, and consists in the fact that the land to which the lien is to apply must be designated by the court, and is limited to the convenient occupation of the building.

We advise that the judgment be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Henshaw, J., Lorigan, J., McFarland, J.

The Principal Case is supported by Goodman v. Baerlocher, 88 Wis. 287, 43 Am. St. Rep. 893; but see the note thereto at pages 905, 906.

LEAN v. GIVENS.

[146 Cal. 739, 81 Pac. 128.]

HOMESTEAD, Lien of Execution Levy upon.—The levy of an execution on property described in a declaration of homestead which exceeds in value the amount of the homestead exemption creates a lien thereon so far as there is an excess over the exemption. (p. 80.)

EXECUTION.—The Levy of an Execution on Lands Creates a Lien where none previously existed by virtue of the judgment. (p. 82.)

HOMESTEAD—Execution Sale, Power of the Court to Proceed Without Notice on the Report of the Appraisers.—If, after the levy of an execution on property claimed as a homestead, and the appointment of appraisers, they report that the value of the property exceeds the amount of the homestead exemption, and that the land cannot be divided, the court may, without notice to the defendant, order a sale of the whole premises, where the homestead exemption is purely a statutory right, and the statute does not require such notice. (p. 83.)

HOMESTEAD, Execution Against, Delay in Proceedings, When not Fatal.—The fact that, after the levy of an execution on premises claimed as a homestead, no further proceedings were taken for sixteen months, does not show that the levy was abandoned, nor prevent the plaintiff from subsequently prosecuting the proceedings necessary to authorize the sale of the property under his writ. If the defendant believed the delay unreasonable, his remedy was by motion in the court whence the writ issued to have the levy vacated. (pp. 83, 84.)

A. H. Jarman, for the appellant.

Charles W. Davison and J. H. Russell, for the respondent.

740 SHAW, J. This is an appeal by the defendant from an order of the superior court in a proceeding under the provisions of sections 1245 to 1258, inclusive, of the Civil Code, directing the sale on execution of certain lands held by the judgment defendant as a homestead.

The judgment defendant, Juliet H. Stark, was not the head of a family, and consequently the amount of the homestead exemption was only one thousand dollars. The judgment was entered and docketed on October 23, 1899, and the homestead was selected prior to that date. The appraisement made in the proceeding showed the property comprising the homestead to be worth four thousand seven hundred dollars. The execution was levied on the property on November 4, 1899, and an attempt was made to sell, upon the claim that the homestead was invalid. This sale was enjoined and final judgment was made in the injunction suit on May 18, 1900, prohibiting the judgment plaintiff

from enforcing the levy otherwise than by proceedings under the Civil Code, sections 1245 to 1258, inclusive. On May 2, 1900, the judgment defendant sold and conveyed the land to the appellant, Givens, and on October 12, 1900, the judgment was assigned to the respondent, Walter ⁷⁴¹ J. Lean. The petition for the appointment of appraisers under section 1245 of the Civil Code was not filed in the superior court of the county until March 5, 1901.

There is thus presented the question whether or not the levy of an execution on property described in a declaration of homestead which exceeds in value the amount of the homestead exemption creates any lien on the land so far as there is an excess over the homestead exemption.

We refer to the lien of the levy as distinct from the judgment lien, because in *Lubbock v. McMann*, 82 Cal. 230, 16 Am. St. Rep. 108, 22 Pac. 1145, it appears to have been held that a judgment is not a lien on any part, either in extent or value, of the homestead premises, even in cases where there is an excess in value above the homestead exemption. This is contrary to the rule in other states in which the extent of the exemption of the homestead is measured by a certain limited value: See note in 34 Am. St. Rep. 505. In several other cases in this state, where the fact of there being an excess in value was not apparent, the court has stated in general terms that a judgment is not a lien upon property embraced in a valid declaration of homestead: *Dam v. Zink*, 112 Cal. 92, 44 Pac. 331; *Sanders v. Russell*, 86 Cal. 120, 21 Am. St. Rep. 26, and note, 24 Pac. 852; *Barrett v. Sims*, 59 Cal. 615; *Bowman v. Norton*, 16 Cal. 221; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516.

Conceding, for the purposes of this case, that the judgment is not even a provisional or conditional lien on the possible excess in value, we are of the opinion that the levy of an execution on the property establishes a lien thereon to the extent of the excess over the homestead exemption which may ultimately, by proper proceedings under the Civil Code, be determined to exist, and that the substituted defendant, Givens, having purchased after the levy, took the land subject to the right of the judgment plaintiff to have it sold upon such proceedings.

The rule at common law was, that an execution was a lien on personal property from the time of its issuance, although there was no levy (2 Freeman on Executions, secs. 199, 200). But at common law neither a judgment nor an execution was a

lien on land, and the method of applying the land of the judgment debtor to the satisfaction of a judgment was by means of ⁷⁴³ a writ of elegit, whereby the officer, after exhausting the personal property, could seize the land and apply the rents and profits of one-half thereof upon the writ: 3 Freeman on Executions, sec. 370. The common law is in force in this state except as modified by statute, or the constitution: Pol. Code, sec. 4468. It has been so far modified by the code that the only means of enforcing a judgment for money is by writ of execution (Code Civ. Proc., secs. 681, 683), and that land may be taken on the execution as well as personal property: Code Civ. Proc., sec. 688. It is also provided that the real estate of a judgment debtor is "liable to execution," and "may be attached on execution" in the same manner as upon a writ of attachment, but it is not affected by the execution until there is a levy: Code Civ. Proc., sec. 688. The effect of these provisions, in connection with the common law in force, is to enlarge the execution, by making it enforceable against land, and to make it, when levied, a lien or charge on the land. Where the judgment is a lien on the land there is no real necessity for a formal levy, as it adds nothing to the effect of the sale on execution: *Lehnhardt v. Jennings*, 119 Cal. 195, 48 Pac. 56, 51 Pac. 195. But where the judgment is not a lien, the property is not taken on execution until there is a levy, and the lien does not begin until that act is done: *Summerville v. Stockton M. Co.*, 142 Cal. 540, 76 Pac. 243. The levy of an execution is made in the same manner as upon an attachment (Code Civ. Proc., sec. 688)—that is, by filing with the county recorder a copy of the writ with a notice that the land, describing it, is attached, and serving a similar notice on the occupant: Code Civ. Proc., sec. 542. The purpose of a lien is to cut off rights of third persons which might otherwise accrue between the time of levy and the time of sale. The filing of the notice in the office of the recorder is clearly for no other purpose than to give notice to third persons of the prior charge. Section 537 of the Code of Civil Procedure declares that the plaintiff in an action may "have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered," and section 688 provides that the land and other property "may be attached on execution, in like manner as upon writs of attachment." Considering the effect of all these provisions, we think it is clearly shown that the levy of an execution upon land, where the judgment is not a lien, ⁷⁴³ creates a lien

on the land from that date, which will charge whatever interest in the land is, or may be made to be, subject to the execution, including the excess in value of homestead property over the homestead exemption. That a levy creates a lien on land where none exists by the judgment has always been assumed by this court, and it is generally understood in the profession to have that effect: See *Blood v. Light*, 38 Cal. 657, 99 Am. Dec. 441; *Beaton v. Reid*, 111 Cal. 486, 44 Pac. 167; *Summerville v. Stockton M. Co.*, 142 Cal. 540, 76 Pac. 243; *Lehnhardt v. Jennings*, 119 Cal. 195, 48 Pac. 56, 51 Pac. 195.

Section 1240 of the Civil Code in effect declares that the excess in value of the homestead property, over and above the exemption allowed, is subject to execution in the manner provided in the subsequent sections of that chapter. Sections 1245 to 1261 provide a plan whereby this excess may be subjected to sale on the execution, where the homestead antedates the judgment. The levy on the property covered by the homestead declaration must be made as the first step in the proceeding to subject the excess to the payment of the judgment: Civ. Code, sec. 1245. We conclude that by this levy a lien is imposed on the property conditionally to become absolute in the event that it is determined in the proceeding that an excess exists, and that a purchaser after the levy takes subject to the lien.

The statement in *Sanders v. Russell*, 86 Cal. 120, 21 Am. St. Rep. 26, and note, 24 Pac. 853, that "a levy creates no lien," is qualified by the subsequent language of the opinion, and, when taken in connection with the facts involved, must be understood to mean that it does not create a lien that will continue after the lien of the judgment would have expired, nor a lien which can exist independent of proceedings under the Civil Code to enforce it.

The appellant contends that the proceeding was irregular because there was no time fixed for a hearing upon the report of the appraisers, and the order of sale was made without any notice other than the original notice of the time and place of hearing the petition. The code does not require any notice or hearing after the report of the appraisers is filed. It seems to contemplate that the order for a sale, where the report is that the land cannot be divided, or for a partition, if it is divisible, is to be made by the court, ex parte, from an inspection ⁷⁴⁴ of the report alone. Section 1254 provides that "If, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption,

and that it cannot be divided, he must make an order directing its sale under the execution." In the case at bar, the court finds that the claimant is not the head of a family, and hence her right to a homestead is entirely of statutory creation, and is subject to the statutory conditions with respect to its sale on execution. As the statute does not require notice of the hearing of the report of appraisers, and the homestead exemption is purely a statutory right limited by statutory conditions, the courts cannot impose restrictions upon the right of the creditor to enforce a sale in addition to those imposed by statute. There can be no occasion for further orders of the court or judge in the matter in cases like the present where the report is that the property cannot be divided. The value is finally determined by exposing the property to sale. If a bid is not made in excess of the amount of the exemption the proceedings are ended. If a larger amount is offered it conclusively proves that the value exceeds the exemption, and in that event the excess is of right applicable on the debt, and the claimant has no just cause to complain. His homestead exemption was from the beginning subject to the contingency which has happened, and his valuation of the property is, by the statute which gives him the exemption, made subject to revision by appraisers appointed upon the petition of a judgment debtor.

It may be that where the report is, that a division can be made and the excess set off for sale there should be further proceedings, hearings and notices for the purpose of securing the right to a just division, as was held in *Brown v. Starr*, 75 Cal. 164, 16 Pac. 760. That, however, was a homestead of the head of a family. In any case, however, we perceive no good reason for holding that further notice must be given where the appraisers report that the property cannot be divided. Neither the court nor the judge is given power to revise or set aside the decision of the appraisers as to the possibility of making a fair division. The remarks in *Stone v. McCann*, 79 Cal. 462, 21 Pac. 863, with respect to further notice upon the hearing of the report of the appraisers, is merely a part of the argument upon another question, and the subject matter of the notices was not before the court. It is not to be considered as ⁷⁴⁵ authority, at least with regard to a homestead claim by one not the head of a family.

With respect to the delay of sixteen months after the levy before the institution of the proceeding under the Civil Code to obtain a sale on execution in pursuance of the levy, it is

sufficient to say that it does not establish the fact that the execution levy was abandoned. Part of the delay is explained by the pendency of a suit to enjoin the sale. If the defendant believed the subsequent delay unreasonable, and had good cause for such belief, she should have proceeded in the superior court by motion to have the levy vacated, and her grantee was entitled to the same remedy.

The order is affirmed.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

If the Premises Occupied as a Homestead by a debtor exceed in value the statutory exemption limit, the lien of a judgment against him will attach to such excess in value, and it is subject to levy and sale under execution: See the monographic note to *Vanstory v. Thornton*, 34 Am. St. Rep. 505. Compare, however, *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26.

A Lien on Land existing by virtue of a levy under execution is not lost by delay in proceeding to sell, when no fraudulent purpose is shown on the part of the creditor. The lien remains in force until the statute of limitations bars any right to foreclose it: *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588. See, too, *Gillespie v. Keating*, 180 Pa. St. 150, 57 Am. St. Rep. 622.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

FLINT RIVER LUMBER COMPANY v. SMITH.

[122 Ga. 5, 49 S. E. 745.]

POWERS OF ATTORNEY—Registration—Constructive Notice.

A power of attorney executed in the same manner that a deed subject to registry must be executed may be recorded immediately upon its execution, and whenever a conveyance subsequently made under the authority of such power is thereafter duly recorded, the power of attorney and the deed should be considered as recorded with each other, and they become constructive notice from that date, and the power of attorney is admissible in evidence under the same rules as the deed. (p. 87.)

Donalson & Donalson, for the plaintiff.

A. H. Russell and T. S. Hawes, for the defendants.

* COBB, J. Powers of attorney are not mentioned in the registry laws of this state. The law which imposes the duties of a registration officer upon the clerk of the superior court requires him to keep "books for recording all deeds, mortgages and other liens, and bills of sale separately." Unless the power of attorney is considered a part of the instrument executed under its authority, there is nothing in our law which would make its registry constructive notice. In *Tenant v. Blacker*, 27 Ga. 418, it was held that powers of attorney may be recorded under the same rules as the deeds made under them, and when thus recorded may be read in evidence in the same way as registered deeds. Judge Benning in the opinion stated that the practice of recording powers of attorney "along with the deeds made under them," and admitting them in evidence without further proof "along with their deeds," was a practice of so long standing that the court did not feel prepared to disturb it. In *Anderson v. Dugas*,

29 Ga. 440, it was held that when a deed executed under a power of attorney is duly recorded, the record of it is constructive notice though the power of attorney be not recorded. Judge Stephens in the opinion says: "We do not think that the recording of the power of attorney ⁷ was necessary to make the record of the deed serve as notice. The power of attorney is a muniment of title, and may therefore be properly recorded along with the deed":. See, in this connection, *Jackson v. Neely*, 10 John. 374. In *Graham v. Campbell*, 56 Ga. 258, it was ruled that the existence of a power of attorney which was "recorded with the conveyance" could be shown by a copy from the records.

In *Dodge v. American Freehold Co.*, 109 Ga. 396, 34 S. E. 673, Mr. Chief Justice Simmons says: "This power of attorney, under our law, must be recorded with the deed made by the attorney in fact." There are a number of cases where reference is made to the recording of powers of attorney, and the expressions "along with the deed," or "with the conveyance," or similar expressions have been used; but in none of the cases cited nor in any other case, so far as we have been able to ascertain, is there a distinct ruling declaring what is the meaning of such expressions. Do they mean that the power of attorney must be recorded at the same time, in the same book, and in physical connection with the deed executed under it? Or do they mean that the power of attorney must be recorded at the same place that deeds are recorded, that is, in a particular book in the office of the registrar of deeds, without reference to whether the deed executed under it is recorded in the same book or in immediate connection with the power? In Maryland there was a statute which declared that a power of attorney to sell real estate should be "recorded with the deed" executed under the power. In *Rosenthal v. Ruffin*, 60 Md. 324, it was held that the power of attorney might be recorded either at or before the recording of the deed, that the statute did not require it to be recorded eo instanti with the deed, the terms "with the deed" meaning "upon the proper records of the city or county where the deed is recorded." In that case the power of attorney was recorded before the deed was executed thereunder. In *Mix v. Hotchkiss*, 14 Conn. 32, Church, J., said that the power of attorney "was recorded with the deed," although it did not appear upon the same page or leaf of the book of records as the deed, but at a distance of eighty pages from it, and was recorded after the record of the deed. There was, however, no distinct ruling by the court on this question, as the case was decided on another point. The

power of attorney is for some important purposes an essential^s part of the deed, and is complete in itself; and we see no good reason why a power of attorney, executed in the same manner that a deed subject to registry would be executed, might not be entered upon the record immediately upon its execution, and that, whenever a conveyance subsequently made under the authority of the power of attorney is thereafter duly recorded, the power of attorney and the deed should not be considered as recorded with each other, both being found upon the records where those interested are bound to go to obtain information in reference to muniments of title. The order in which the deed and the power are recorded is immaterial. Of course the naked power of attorney, although recorded, would not be constructive notice until the deed executed thereunder is also placed upon record; but whenever both are recorded, the power of attorney as a part thereof will become notice from that date. The deed showed upon its face that it was executed under a power of attorney, and this would be sufficient to put a purchaser upon inquiry as to the existence and genuineness of the power of attorney, and would naturally lead to a search of the records to ascertain whether the same had been recorded, although, as held in *Anderson v. Dugas*, 29 Ga. 440, and in the New York case cited above, the record of the power of attorney was not essential to make the deed constructive notice of the conveyance.

Judgment reversed.

All the justices concur.

That a Power of Attorney to convey land must be recorded like the deed itself, see the note to Davenport v. Parsons, 81 Am. Dec. 776.

CENTRAL RAILWAY COMPANY v. CHICAGO PORTRAIT COMPANY.

[122 Ga. 11, 49 S. E. 727.]

ACTIONS—Construction of Pleading.—If plaintiff has a right to elect to sue either upon a contract or for a tort arising out of a breach of duty under the contract, the petition, if equivocal in its terms, will be construed as claiming damages for the tort. (p. 88.)

CARRIERS—Place of Conversion of Freight.—If a common carrier ships nonperishable freight from the point of destination to which it was originally shipped to another point, for the purpose of selling it as unclaimed freight, the conversion of the goods, if any, is in the county where such point of destination is located. (p. 88.)

CARRIERS—Conversion of Goods.—In an action of tort against a common carrier for the conversion of goods shipped, he cannot take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate, or securing a like collateral advantage. (p. 89.)

CARRIERS—Conversion of Goods—Damages.—In an action of tort against a common carrier for the conversion of goods shipped, the expenses of plaintiff's agent incurred in waiting for the delivery of the goods upon the mistaken statement of the carrier's agent that they had not arrived, when in fact they had, are too remote to form the basis of a recovery. (p. 89.)

COSTS—Attorneys' Fees, Recovery of as.—An allegation that plaintiff has made every effort for the past year and a half to get a settlement of his claim with defendant, without success, and that defendant's persistent refusal to settle or pay entitles plaintiff to his reasonable attorneys' fees incurred in bringing and prosecuting this suit, is not sufficient to require the allowance of such fees under a statute authorizing such allowance if the defendant has acted in bad faith, or been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. (p. 89.)

Wooten & Hofmayer, for the plaintiff in error.

S. J. Jones and Mayson, Hill & McGill, for the defendant in error.

¹² COBB, J. 1. We think the petition can be properly construed as seeking to recover for a tort committed in converting the goods. But even if the language of the petition is equivocal, any doubt as to its meaning is to be resolved by construing it as an action for a tort, rather than as an action for a breach of the contract of transportation. It has been said that in cases where the plaintiff has a right to elect to sue either upon a contract or for a tort arising out of a breach of duty under the contract, the petition, if ¹³ equivocal in its terms, will be construed as claiming damages for the tort: *Aiken v. Southern Ry. Co.*, 118 Ga. 120, 98 Am. St. Rep. 107, 44 S. E. 828, 62 L. R. A. 666.

2. The suit was brought in the city court of Albany. The goods were sold in Savannah. The plea to the jurisdiction set up that the suit was improperly brought in Dougherty county, but should have been brought in Chatham county where the sale took place, it being claimed that there was no conversion of the goods until the sale took place. The sale was undoubtedly a conversion; but we think the conversion was complete when the agent at Albany shipped goods to Savannah as unclaimed freight, for the purpose of sale, within less than six months after they had arrived at destination: See Civ. Code, sec. 2303. The plaintiff might have sued in Savannah, but it certainly had a right to sue in Albany.

3. It was contended that the contract of transportation was an Illinois contract, and was therefore to be governed by the laws of that state; and that under such laws a common carrier has a right to make a special contract, upon a sufficient consideration, limiting its liability for negligence and fixing the amount to be recovered in the event of a loss; and that under the contract made in this case with the initial carrier in Illinois, if the plaintiff was entitled to recover at all, it was entitled to recover only five dollars for every hundred pounds of freight. We do not find it necessary to determine in this case whether the contention as to the law of Illinois is correct, or whether, if correct, that law is applicable to the contract of carriage referred to in the petition. This suit is not brought for a breach of the contract of carriage. The wrong complained of is a conversion of the plaintiff's goods after the contract of carriage was completed. As was well said by Mr. Justice Lamar, in *Georgia etc. Ry. Co. v. Johnson*, 121 Ga. 233, 48 S. E. 808: "In an action of trover or damages for conversion the tort-feasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

4. The plaintiff claimed as a part of its damages the expenses of its agent while he was waiting at Albany for the goods to arrive, after four of the boxes had reached there and the agent had informed him that the other would soon come, when in fact ¹⁴ it had actually arrived at that time. We do not think damages of this character could be properly recovered. They do not flow directly from the wrongful act, and are too remote to be the basis of a recovery. The court, therefore, erred in not striking upon demurrer that portion of the petition which claimed these damages.

5. In the ninth paragraph of the petition appears the following allegation: "Petitioner insists that as it has made every effort for the past year and a half to get a settlement of this claim out of said railway, without success, and said company's persistent refusal to settle or pay the same entitles petitioner to recover from said company its reasonable attorneys' fees incurred in bringing and prosecuting this suit, which it shows is the sum of one hundred dollars." The averments just quoted were specially demurred to, on the ground that they did not set out any legal reason why the defendant should be subjected to a claim for attorneys' fees. We think this demurrer was well taken.

Attorneys' fees are not generally allowed a litigant; but the code declares that they may be allowed if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense: Civ. Code, sec. 3796. There was no allegation that the defendant had acted in bad faith, or had been stubbornly litigious, nor was it in terms alleged that it had caused the plaintiff unnecessary trouble and expense. The averment was in effect merely that the defendant had so acted as to compel the plaintiff to bring a suit to recover the amount due it. This is not sufficient to tax the defendant with attorneys' fees: *Pferdmenges v. Butler*, 117 Ga. 400, 43 S. E. 695; *Traders' Ins. Co. v. Mann*, 118 Ga. 381, 45 S. E. 426.

6. While there are other assignments of error, none of them are of such a character as to require an extended discussion, and any error that may have been committed would not be sufficient of itself to require a reversal of the judgment. The evidence fully authorized a judgment in favor of the plaintiff for the sum of one hundred and thirty-eight dollars and sixty cents, as the value of the articles lost; and as this exact amount was sued for, and no interest was claimed in the petition, the recovery should have been limited to this sum: *Georgia R. Co. v. Crawley*, 87 Ga. 192, 13 S. E. 508. If the plaintiff will write off from the verdict and judgment the attorneys' fees found and all damages ¹⁵ except one hundred and thirty-eight dollars and sixty cents, the judgment will be affirmed; otherwise a judgment of reversal will be entered.

Judgment affirmed, on condition.

All the justices concur.

Trover and Conversion Against and by Carriers are discussed generally in the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 815, and in the subsequent case of *Marshall etc. Grain Co. v. Kansas City etc. R. R. Co.*, 176 Mo. 480, 98 Am. St. Rep. 508, and cases cited in the cross-reference note thereto. That a carrier who wrongfully sells goods to enforce his lien thereon for freight is guilty of conversion, see *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246, 83 Am. Dec. 626. See, too, *Nathan v. Shivers*, 71 Ala. 117, 46 Am. Rep. 303; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387.

CASSELS v. FINN.

[122 Ga. 33, 49 S. E. 749.]

TRUSTS—Failure to Perform Promise—Trustee Ex Maleficio.—

Failure to perform a verbal promise made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that he will dispose of her estate as she desires, cannot make him, in case of an intestacy, a trustee ex maleficio as to the property inherited by him, in the absence of actual fraud. (pp. 92, 93.)

Denmark, Ashley & Smith and S. A. Roddenbery, for the plaintiffs.

Hammond & Hammond and F. Mitchell, for the defendant.

³⁴ EVANS, J. Unless the allegations of the petition respecting the conduct of the husband of the defendant relating to the intestacy of Mrs. Susie Finn will imply a trust which can be established by parol proof, the demurrer was rightfully sustained. Express trusts must be created or declared in writing: Civ. Code, sec. 3153. Hence, the parol promise alleged to have been made by John Finn to his first wife cannot be upheld as an express trust. But if from the nature of the transaction it be manifest that it was the intention of Mrs. Susie Finn to make a will devising her property to plaintiffs, as alleged in the petition, and she was prevented from so doing by the fraud of her husband, whereby upon her decease he became vested with the absolute title to all her property as heir at law, equity will imply a trust: Civ. Code, sec. 3159. "There is no law which requires a fraudulent undertaking to be manifested by writing. Those who use promises, which they make deceitfully, for the purpose of accomplishing fraudulent designs, are generally careful not to furnish ³⁵ written evidence of their turpitude. Such promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts; but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust": Brown v. Doane, 86 Ga. 38, 12 S. E. 179, 11 L. R. A. 381. The learned judge who delivered the opinion in that case quoted approvingly from 2 Pomeroy's Equity Jurisprudence, section 1656: "In order that the doctrine of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal."

cal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." There is a great difference between the breach of a promise made with no intention of performing it and the breach of a promise not fraudulent of itself. In discussing this distinction, Lumpkin, J., in *Robson v. Harwell*, 6 Ga. 615, said: "The rule I am contending for is not only the rule of the books, but it is the dictate of sound reason. Let the doctrine be once established that a failure to comply with a parol promise made contemporaneous with a deed is, ipso facto, a fraud and can be proved, and the promise decreed to be performed in equity on the ground of fraud, and you do what the master of rolls, in *Portmore v. Morris*, refused to do—demolish one of the foremost rules of law."

Do the allegations of the petition show any fraudulent conduct on the part of John Finn? It is charged that Mrs. Susie Finn sent for her husband and "repeated to him several times what disposition she wanted made of her property," it being the same described in the petition. "Thereupon the said John L. Finn said to his wife, 'I promise and swear to do everything just as you wish and as you have stated'; his wife then replied to him, 'John Finn, your word is as good as a will.' The said Mrs. Susie S. Finn then, relying on his promise and believing that he would in good faith carry out her wishes, decided not to have a will prepared." This conversation is said to have occurred on June 18, 1894, and Mrs. Finn died on the 25th of July following. The petition further states that for some time after her death, her husband seemed disposed to carry out and perform in good faith his ³⁶ promise to his deceased wife, even going so far as to make remittances to Mrs. Cassels of moneys received by him in part from the collection of rents and from the sale of a vacant lot in Thomasville, and repeatedly assuring Mrs. Cassels of his intention to carry out every pledge made to his deceased wife. John Finn, up to the time of his death, also paid the school expenses of Alexander Cassels. According to the petition, Finn never denied his parol promise to his deceased wife but died without executing it. No act of mala fides is alleged, and, so far as we can learn from the petition, it was Finn's intention to perform his promise. His promise to his wife does not appear to have been made with contemporaneous fraudulent intent. The failure to perform a verbal promise made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that

he will dispose of her estate as she desires, cannot make the heir at law in case of an intestacy, a trustee *ex maleficio* as to the property inherited by him, in the absence of actual fraud. There is a line of authorities, both English and American, holding that if a testator be induced to make a devise by the promise of the devisee that it shall be applied to the benefit of another, a trust is thereby created which may be established by parol evidence: *Oldham v. Litchfield*, 2 Vern. 506; *Thynn v. Thynn*, 1 Vern. 296; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Williams v. Fitch*, 18 N. Y. 546; *Church v. Ruland*, 64 Pa. St. 432; *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464, 2 L. R. A. 662. The reasoning of this line of decisions is strongly put by Gibson, C. J., in *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52: "It is contended that parol evidence of a trust is contrary to our statute of wills, which corresponds, as far as regards the point in dispute, with the British statute of frauds. Undoubtedly every part of a will must be in writing; and a naked declaration of trust in respect of land devised is void. The trust insisted on here, however, owes its validity, not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise." So, in the case of *Dixon v. Olmius*, 1 Cox, 414, the will of Lord Waltham had been revoked by suffering a fine and recovery, and ³⁷ Lord Waltham desired to republish it, but was fraudulently prevented by acts of fraud and violence of Mr. Olmius, the husband of the testator's daughter, who was tenant in tail and entitled to the estate in case the recovery was defeated. Lord Thurlow held that the tenant in tail could not take advantage of her husband's fraud, and that the estate would be treated as if the will had been republished.

The case of *Bedilian v. Seaton*, 3 Wall. Jr. 279, 3 Fed. Cas. 38, differentiates between a transaction whereby the absolute title is acquired by will by means of a fraudulent promise, and one whereby the title is acquired by inheritance by means of a fraud practiced by the heir at law to prevent his ancestor from making a will otherwise disposing of his estate. The facts of this case are very similar to those of the case at bar, and the distinction sought to be pointed out is that in case of the procurer of the title by will by fraudulent promise of the devisee a trust arises which adheres to the land thus fraudulently obtained, whereas

when the title is cast upon the heir by the law such a trust cannot be implied; for in the latter case the promise would be a mere parol contract, and not a trust descending with the land. In principle, I am unable to perceive any rational distinction between the two classes of cases. In each the title is procured by means of fraud, and it is the fraud which creates the trust, and not the particular manner by which the result is accomplished. Pervading all the cases cited the dominant note is fraud, and not the mere breach of a parol promise. The Illinois supreme court clearly brings out this distinction in *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, wherein it is ruled: "If A voluntarily conveys lands to B, the latter having taken no measures to procure the conveyance, but accepting it and verbally promising to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interfered and advised A not to convey directly to C, but to convey to him, promising if A would do so he, B, would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A." To the same effect, see *Fischbeck v. Gross*, 112 Ill. 208. Before one can become a trustee ex maleficio, he must obtain another's property from him by fraud.

⁸⁸ We have endeavored to demonstrate that the plaintiffs' cause of action is dependent upon the determination of the conduct of the defendant's husband as fraudulent. That it was not fraudulent is clear from the allegations of the petition. His parol promise appears to have been made in good faith, and the breach thereof was occasioned by his death before fulfillment. Mrs. Susie Finn lived five weeks after her husband made the promise; during this period the husband is not charged to have done any act to prevent the execution of a will. His wife simply relied on a promise, not binding in law but only in conscience. The failure to perform such verbal promise was not per se fraudulent; and as no act of fraud is alleged to have been committed by John Finn whereby he became the owner of the property upon the decease of his wife, he was not a trustee ex maleficio. The demurrer was properly sustained.

Judgment affirmed.

All the justices concur.

HEIR, DEVISEE OR LEGATEE AS TRUSTEE EX MALEFICIO.

I. Devise Induced by Fraudulent Promise, 95.

II. Parol Proof to Establish Trust, 99.

I. Devise Induced by Fraudulent Promise.—A trust *ex maleficio* arises whenever a person acquires the legal title to property by means of an intentionally false or fraudulent verbal promise to hold it for a certain specific purpose, and, having thus obtained the title, retains and claims the property as his own in violation and disregard of his promise: *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116; *Rollins v. Mitchell*, 52 Minn. 41, 38 Am. St. Rep. 519, 53 N. W. 1020; *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep. 789, 13 N. E. 626. Such a trust arises against an heir, legatee or devisee where a person, knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking. In such event, it is, in effect, a case of trust; and the court will not allow the devisee to set up the statute of frauds, or, rather, the statute of wills, by which the statute of frauds is now, in this respect, superseded, but will, for the prevention of fraud, ingraft a trust on the devise and constitute the devisee a trustee *ex maleficio*: *Orth v. Orth*, 145 Ind. 184-196, 57 Am. St. Rep. 185, 194, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298; *Laird v. Vila*, 93 Minn. 45, post, p. 420, 100 N. W. 656.

If an heir or a devisee prevents the testator from providing for one for whom he intended to provide, but for the interference of the heir or devisee, the latter will be deemed a trustee by operation of law, of the property received by him from the testator's estate to the amount that the defrauded person would have received had the testator's intentions not been interfered with. Or, if a testator or ancestor makes known to his devisee or heir his desire that his property shall be disposed of in a particular manner, and that he relies upon the latter to carry his desire into effect, and the devisee or heir uses words, or does acts, calculated to cause, and which he knows do in fact cause, the testator or ancestor to believe that he fully assents thereto, and when, in consequence thereof, the testator or ancestor makes, or omits to make, a will, or such particular disposition of his property in his lifetime as will carry out his desire, a constructive trust is created against such devisee or heir: *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240; *Gaither v. Gaither*, 3 Md. Ch. 158; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Williams v. Fitch*, 18 N. Y. 546; *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53; *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52; *Richardson v. Adams*, 10 Yerg. 273; *Bennett v. Harper*, 36 W. Va. 547, 15 S. E. 143; *Brook v. Chappell*, 34 Wis. 405. Equity acts in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the

devisor which equity will not endure: *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. Rep. 53-56. In such event courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done, and this they will do by converting the person who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done. Thus, if a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a will from being made in favor of a third person, and the property intended for such third person afterward comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him: *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143.

To uphold such a trust *ex maleficio* of the class here referred to, it is necessary to prove that the decedent relied upon the promise or acts of the heir or devisee as an effective arrangement for the future disposition of his property: *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240; *Laird v. Vila*, 93 Minn. 45, post, p. 420, 100 N. W. 656; and also fraud on the part of the promisor, as a mere refusal to perform the trust is undoubtedly not enough alone, and it must also appear that there has been a fraudulent agency, active or passive, in procuring the devise, in order to create the trust against the devisee: *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 254, 16 Atl. 464, 2 L. R. A. 662. Examples of the application of the doctrine above announced are numerous. Thus if an heir, personal representative or devisee, whose interest would be prejudiced by the insertion of a provision in a will in favor of some third person, induces the testator to omit such provision by assurances, either by words or by silent assent, that his wishes shall be executed as though the provision were made, such assurance will raise a trust which will be enforced in equity on the ground of fraud: *Gaither v. Gaither*, 3 Md. Ch. 158. If the residuary legatee named in a will promised the testator that he would pay certain persons specified sums as legacies, and the testator was thus induced to omit changing his will in that respect, or adding such provisions thereto by codicil, the facts are sufficient to establish a trust in favor of such proposed legatees, and against such residuary legatee for the amounts so agreed to be paid. Such a trust may be declared upon an implied as well as upon an express promise, and upon evidence of silent assent as well as upon evidence of express words: *Brook v. Chappell*, 64 Wis. 406. Or if a testator bequeaths property in trust to a legatee, without specifying in the will the purposes of the trust, and, at the same time, communicates this purpose to the legatee orally or by unattested writing, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, a court

of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that such legatee will not be countenanced in perpetrating a fraud, by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise: *Curdy v. Berton*, 79 Cal. 420, 12 Am. St. Rep. 137, 21 Pac. 858, 5 L. R. A. 189. And to the same effect, *Becker v. Schwerdtle*, 141 Cal. 386, 74 Pac. 1029. If a devisee in a will is active in preventing the testator from making an intended provision therein for another, for whom provision would have been made but for his intervention, such devisee will be held to be a trustee of any devise to himself to the extent that it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Such interception and diversion of the testator's bounty amount to fraud, from which a trust arises by operation of law: *Ragsdale v. Ragsdale*, 68 Miss. 92, 24 Am. St. Rep. 256, 8 South. 315, 11 L. R. A. 316. Or if a husband expressed to his wife his intention of devising all of his property to his own heirs, but was induced by her to sell and will it to hers, in form absolute, upon her assurances that she would use it during her natural life, and at her death would devise it to his heirs, upon the failure or refusal of the devisee to perform her agreement after the death of the testator, equity will decree a trust in favor of such heirs, and convert the devisee into a trustee for their benefit: *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464, 2 L. R. A. 662. And if a wife induces her husband to convey to her by will all of his real and personal property, upon the express promise that she, in turn, will convey the same property by will to designated relatives, upon default on her part to carry out the agreement, she takes the property as trustee ex maleficio for the benefit of such designated relatives: *Laird v. Vila*, 93 Minn. 45, post, p. 420, 100 N. W. 656. Or if a grantor in contemplation of death, and for the purpose of making an equitable division and disposition of his property between those entitled to it, has conveyed it to his wife, who has no other property, upon her express promise, which was part of the consideration of the conveyance, that she would pay a specified sum to his grandchild, while no express trust is created by the deed or her promise, yet upon her refusal to pay, equity will declare her a trustee ex maleficio for the protection of the intended beneficiary, the trust not affecting the deed, but acting upon the gift as it reaches the possession of the grantee, and will compel payment out of the property conveyed: *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666. In this case the court said that "In the recent case of *Amherst College v. Ritch*, 151 N. Y. 282, 323, 45 N. E. 876, 887, 37 L. R. A. 305, Vann, J., in delivering the opinion of the court, says: 'If the testator is induced either to make a will, or not to change one after it is made, by a promise,

express or implied, on the part of the legatee, that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. . . . The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him: *Williams v. Fitch*, 18 N. Y. 546; *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165; *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245, 16 Atl. 464, 2 L. R. A. 662. The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made, and hence the person promising is bound in equity to keep it, as to violate it would be fraud. . . . The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing; but it acts upon the gift itself as it reaches the possession of the legatee or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that the equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund, by requiring the legatee, to act in accordance with the instructions of the testator and his own promise.' See, also, *O'Hara v. Dudley*, 95 N. Y. 403, 47 Am. St. Rep. 53; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Wood v. Rabe*, 96 N. Y. 414, 425, 48 Am. Rep. 640; *Moyer v. Moyer*, 21 Hun, 67; *Wheeler v. Reynolds*, 66 N. Y. 227; *Brown v. Lynch*, 1 Paige, 147; *Dowd v. Tucker*, 41 Conn. 197; *De Laurencel v. De Boom*, 48 Cal. 581; *Browne v. Browne*, 1 Har. & J. 430; *Church v. Ruland*, 64 Pa. St. 442; *Towles v. Burton*, Rich. Eq. Cas. 146, 24 Am. Dec. 409; *McLellan v. McLean*, 2 Head, 684; *Russell v. Jackson*, 10 Hare, 204; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennegal*, 1 Ves. Sr. 124; *Wallgrave v. Tebbs*, 2 Kay & J. 321; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Fairchild v. Edson*, 154 N. Y. 199, 219, 61 Am. St. Rep. 609, 48 N. E. 541; *Ahrens v. Jones*, 169 N. Y. 561, 88 Am. St. Rep. 620, 62 N. E. 666.' If a trustee of a fund to which he would succeed in case of intestacy prevents the making of a will in favor of a third person by promising to hold the fund for the benefit of the intended legatee, the latter may recover the value as money had and received to his use: *Williams v. Fitch*, 18 N. Y. 546.

It would appear to be clear that if one who takes no benefit under the will makes a promise to the testator which he afterward refuses to fulfill, there is no such fraud as to constitute him a trustee *ex maleficio*. Thus, if, upon the execution of a will, a person who takes no benefit under it, promises the testator to give one of his children

as much property as he, the testator, will be able to give to his other children, and thereby induces him not to give to such child any part of his estate, the promise is without consideration, and no trust is created in favor of the child against the person making the promise: *Robinson v. Denson*, 3 Head, 395. The principal case, *Cassels v. Finn*, 122 Ga. 33, ante, p. 91, 49 S. E. 749, we feel assured was not carefully considered or rightly decided. The doctrine that the failure to perform an oral promise, relied upon by the testator, and made by the sole heir at law of one desiring to dispose of his estate by will to third persons, that he will dispose of the estate as the testator desires cannot, in case of intestacy, make the heir a trustee ex maleficio as to the property inherited and claimed by him, unless actual fraud is proved, is certainly opposed to all of the cases heretofore cited in this note, and seems to us to be in contravention of correct and sound equitable principle. Such doctrine is not, however, without support, because it has been held that a parol promise made to the testator by the sole beneficiary under his will, to convey certain property to a person named, even when such promise is relied upon and deliberately broken, and the property all claimed by the heir and devisee, is not such a fraud as creates against him a trust ex maleficio in favor of the person named by the testator and who failed to receive any part of his bounty by reason of the promise made by the heir and relied upon by the testator: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298. And in *Bedilian v. Seaton*, 3 Wall. Jr. 279, Fed. Cas. No. 1218, it was held that a mere breach of promise by heirs at law to convey property as heirs as they had declared to their dying brothers that they would convey it, will not be looked upon favorably as taking the case out of the statute of frauds, even though such promise was actually coupled with comforting assurances to such dying brothers, and remonstrances by which the wish to make a will may have been controlled. This decision was also placed upon the ground that there was no proof of fraud in the case.

II. Parol Proof to Establish Trust.

A trust in an absolute devise may be established by parol evidence of contemporaneous declarations of the testator, and subsequent declarations of the devisee in possession, that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold it in trust. After such evidence of the devisee's active or passive agency in procuring the devise, he will be declared a trustee ex maleficio, and the trust will be enforced against him: *Gaither v. Gaither*, 3 Md. Ch. 158; *Hoge v. Hoge*, 1 Watts, 163, 26 Am. Dec. 52. "Indeed, it is not easy to see how such a trust could ever be made out except by parol evidence, and if this is not competent, a statute made to prevent frauds would become a most potent instrument whereby to give them success. That this doctrine is applied to

cases arising under wills, where a person procures a devise to be made in his favor, on the distinct declaration or promise that he will hold the land in trust either in whole or in part for another, may be seen in the cases. It is not affected by the statutory provisions on the subject of wills. The proof offered is not any alteration, revocation or cancellation which must be evidenced in a particular manner. It gives full effect to the will, and every word of it, and to the conclusiveness of the probate, where it is conclusive. It fastens upon the conscience of the party, having thus procured a will, and the fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence, which a court of equity will enforce by compelling a conveyance when the proper time for it has arrived": *Church v. Buland*, 64 Pa. St. 432-442. If a devisee obtains possession and title to lands intended for another by actual fraud upon the testator, or clear and convincing proof of such fraud, a trust will be raised against such devisee, and such trust may be established by parol evidence: *Moore v. Crump* (Miss.), 37 South. 109.

WILLIAMS v. WILLIAMS COMPANY.

[122 Ga. 178, 50 S. E. 52.]

MORTGAGES—Sale Under Power.—The right to disaffirm a voidable sale under a power contained in a mortgage is personal to the mortgagor. (p. 103.)

MORTGAGES—Sale Under Power.—A creditor of a mortgagor whose judgment is inferior to the mortgage lien cannot, by levy of a common-law execution, subject the mortgaged property to his judgment, when it is held by the mortgagee under a voidable sale under a power contained in the mortgage. (p. 103.)

EXECUTORS AND ADMINISTRATORS—Voidable Sale by—Attack by Creditor.—A judgment creditor of an heir cannot levy upon and sell land formerly belonging to the estate, but held under a voidable title by the administrator because purchased by him at his own sale. (p. 103.)

ESTATES OF DECEDENTS—Voluntary Division by Heirs.—Where the interests of creditors are not involved, heirs may agree upon a division of the estate, or they may adopt and make valid a distribution under what would have been void as a judicial proceeding, such as an irregular report of appraisers appointed to distribute the estate. (pp. 103, 104.)

ESTATES OF DECEDENTS—Voluntary Division by Heirs.—Where a consent division of an estate has been made by the heirs, each heir, without further conveyance, acquires a perfect equity in the property set apart to him, and loses all interest in that assigned to the other distributees. (pp. 103, 104.)

Kay, Bennet & Conyers and W. W. Bennett, for the plaintiff.

Thomas & Parker, for the defendant.

¹⁷⁹ LAMAR, J. On April 5, 1899, Joseph Williams obtained judgment against I. I. Moody and George Moody. The execution was levied on an undivided two-sevenths interest in one hundred and twenty-five acres of lot No. 3, and a like interest in lot No. 2, in the second district of Appling county. The J. P. Williams Company, purchasers under a mortgage from I. I. Moody and Robert Moody, dated January 20, 1897, filed a claim. The plaintiff assumed the burden, and proved that the defendants in fi. fa. were two of seven heirs of I. I. Moody, who died sometime about 1890, in possession of the property levied on. The plaintiff's contention was, that there never had been any lawful sale, distribution, or division of the estate, and that the title to the interest levied on was still in the defendants in fi. fa. The claimant proved that letters of administration were granted to J. H. Dean and Martha E. Moody; that in March, 1892, there was an order to sell lot No. 3; that on April 5, 1892, the administrators conveyed lot No. 3 to J. W. Miles; that on the same day he conveyed lot No. 3 to Martha E. Moody and she, on January 12, 1897, conveyed one hundred and twenty-five acres thereof to I. I. Moody, and this one hundred and twenty-five acres was included in the mortgage of January 20, 1897, from Moody and brother, I. I. Moody, and Robert Moody to J. P. Williams Co. In order to sustain its title to lot No. 2, the claimant, over the plaintiff's objection, offered evidence to show that the administrators of I. I. Moody had applied for the appointment of appraisers to divide the estate; that a division had been made, and the report had been returned to the court in 1896 and 1897, but had not been entered; that after the administrators were discharged, and after the lien of the plaintiff's judgment had attached against I. I. Moody and George Moody, the heirs filed a petition reciting the fact of the appraisement, attaching the report of the appraisers, and asking that the same be made the judgment of the court nunc pro tunc. This order was passed. From the return, dated January 25, 1896, it appeared that the estate had been divided among the heirs, and that the west half of lot No. 2 was assigned to Isaac Moody, and the east half to Robert Moody, these last two being mortgagors, and lot No. 2 being a part of the mortgaged property. In addition, the claimant proved by Mrs. Moody, the administratrix, that

¹⁸⁰ she remembered the division of this land belonging to the estate; that there was never any objection to it; that all the heirs accepted their portion under the division, have always acquiesced under the division, have disposed of their portions in many ways, have received their portions of the estate and acquiesced therein.

Having offered this proof of title to one hundred and twenty-five acres of lot 3, in I. I. Moody, and title in I. I. Moody and Robert Moody to lot 2 under the division aforesaid, the claimant next introduced the mortgage to J. P. Williams Co. This mortgage contained a power of sale, but made no reference to any right on the part of the mortgagee to purchase at such sale. The evidence showed that the property had been advertised in pursuance of the power, and was purchased on January 10, 1899, for nine hundred and eighty-two dollars, by J. H. Thomas, who testified that he acted for the Williams Company in the foreclosure, took from it a deed in his own name, and at once conveyed to it, no money passing. The abstract of the mortgage does not show the amount secured by it. At the conclusion of the evidence the court directed a verdict for the claimant, and the plaintiff in *fi. fa.* excepted. He also assigned as error, that the court allowed the proceedings from the court of ordinary to be proved other than by properly certified copies, and admitted parol evidence of the appointment of appraisers and their returns, and allowed the order *nunc pro tunc* to be offered, the latter having been entered after the discharge of the administrator and after the rendition of the judgment creating the lien in favor of the plaintiff against I. I. and Robert Moody.

A judgment creditor may not only sell the defendant's tangible property, but by garnishment he may acquire a control over his choses in action, and thereby in effect bring suit against his debtor's debtor. Indeed, so extensive are the creditor's rights that it may be said that the judgment creditor stands in the judgment debtor's shoes. But this rule is not without exception. For there are cases in which a creditor may enforce claims where the debtor could not. And, conversely, the debtor may proceed where the creditor could not. Secret liens and fraudulent deeds may bind the one and be ineffective against the other. On the other hand the debtor may sue ¹⁸¹ for torts, but the creditor cannot make such a cause of action available even by a process of garnishment. In some cases it would be greatly to the advantage of the creditor if the debtor would plead the statute of limitations or the statute of frauds, or make particular defenses or assert certain rights. Yet in these cases the creditor can

neither compel the debtor to act nor act for him. The creditor is not the guardian of the debtor, and cannot interpose defenses for him nor avail himself at law of privileges which are personal to the debtor: *Zellner v. Mobley*, 84 Ga. 749, 20 Am. St. Rep. 390, 11 S. E. 402; *Wilson v. McMillan*, 62 Ga. 19, 35 Am. Rep. 115; *Daniel v. Frost*, 62 Ga. 706 (2); *Rawlins v. Rawlins*, 75 Ga. 636. In this case stands the case of disaffirming voidable sales. If the sale had been absolutely void, of course no title would have passed, the lien of the mortgage would have continued, and the land would have been subject to the execution: Compare *Hood v. Perry*, 75 Ga. 310, with *Zellner v. Mobley*, 84 Ga. 749, 20 Am. St. Rep. 390, 11 S. E. 402; *Comer v. Allen*, 72 Ga. 11 (2); *Thompson v. Feagin*, 60 Ga. 82 (2); *Booker v. Worrill*, 55 Ga. 332; *Humphrey v. Copeland*, 54 Ga. 543 (1); *Chappell v. Boyd*, 61 Ga. 667. But here the sale was only voidable. The mortgagee was an agent authorized to sell, even if not authorized to buy: *Whitley v. James*, 121 Ga. 521, 49 S. E. 600; *Mutual Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980. The mortgagor could ratify an irregularity in the execution of the power; or he could within a reasonable time disaffirm. But at the sale title, even if defeasible, passed, and as long as he remained silent, he was bound, and he being bound, so were his privies in estate. The mortgagor has an interest in not being liable for the deficiency in the mortgage debt, or in lessening the amount of the deficiency. It may have been greatly to his interest to let the voidable sale stand. The property may have brought the full amount of the debt, or it may have sold for more than it would bring on a resale. By the levy of an execution issued on a judgment junior to the mortgage the creditor acquires no right to undo what has been done, and what the mortgagor may have good reason to object to having undone: Compare *Martinez v. Lindsey*, 91 Ala. 334, 8 South. 787; *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136, 22 S. E. 928.

2. If the judgment creditor cannot, under an ordinary levy of a common-law execution, object to a voidable sale divesting the title of the mortgagor, neither can he as creditor of the heir take advantage of irregularities in the sale of the property belonging to ¹⁸² the estate, or of the fact that the administratrix bought at her own sale, and therefore acquired only a voidable title.

3-5. Neither can a judgment creditor uproot or set aside partition of the estate. Where the interests of creditors are not involved, the heirs may agree upon a division, or they may adopt

and make valid a distribution under what would have been void as a judicial proceeding. The partition followed by acts adopting the same clothed each heir with a perfect equity to the part assigned to him and at the same time divested his title in what had been assigned to the others. Under this distribution George Moody has no interest in the property levied on. That originally purchased by the administratrix as well as that assigned to Isaac was included in the mortgage, which was older than plaintiff's judgment. The court properly directed a verdict finding the property not subject: *Adams v. Spivey*, 94 Ga. 676, 20 S. E. 422; *Amis v. Cameron*, 55 Ga. 449.

Judgment affirmed.

All the justices concur.

Irregularities in Judicial Sales can, as a rule, be questioned only by the judgment debtor in a direct proceeding: *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596. Persons claiming in the character of judgment creditors cannot avail themselves of a mere irregularity to defeat a consummated sale: *Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174; *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347.

PAVESICH v. NEW ENGLAND LIFE INSURANCE COMPANY.

[122 Ga. 190, 50 S. E. 68.]

CONSTITUTIONAL LAW.—**Personal Security** as guaranteed by constitutional provisions includes not only the right to exist, but also the right of the individual to enjoy life in any way that may be agreeable and pleasant to him, according to his temperament and nature, provided he does not invade the rights of his neighbor or violate public law or policy. (p. 108.)

CONSTITUTIONAL LAW.—**Personal Liberty** includes, not only freedom from physical restraint, but also the right to live as one desires, whether a life of seclusion or of publicity, so long as he does not interfere with the rights of another or of the public. (p. 108.)

CONSTITUTIONAL LAW.—**Right of Privacy.**—The constitutional rights of personal security and liberty include the right of privacy. (p. 109.)

CONSTITUTIONAL LAW.—**The Right of Privacy** within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed by constitutional provisions. (p. 109.)

RIGHT OF PRIVACY.—**Waiver of.**—The right of privacy may be waived, either expressly or impliedly, but the waiver carries with it the right to an invasion of privacy only to such an extent as may

be legitimately necessary and proper in dealing with the matter which has brought about the waiver. The right of privacy may be waived for one purpose and asserted for another; it may be waived in behalf of one class and retained as against another, or it may be waived as to one individual and retained as against all others. (p. 111.)

RIGHT OF PRIVACY—Waiver.—Any person who engages in any pursuit or occupation which calls for the approval or patronage of the public waives his right of privacy in so far that he thereby submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise, proper and expedient to accord to him the approval and patronage which he seeks. (p. 112.)

RIGHT OF PRIVACY—Violation of—Damages.—A violation of the right of privacy is a direct invasion of a legal right and a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved person to recover. (p. 114.)

RIGHT OF PRIVACY.—Liberty of Speech and of the press, when exercised within constitutional bounds, are limitations upon the exercise of the right of privacy, but neither right can be lawfully used to destroy the other. (p. 117.)

RIGHT OF PRIVACY, or the right of the individual to be let alone, is a personal right, in the exercise of which he is entitled to the protection of the courts. (p. 127.)

RIGHT OF PRIVACY.—Publication of One's Picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an unlawful invasion of the right of privacy, and entitles him whose right is thus invaded to recover of the wrongdoer without proof of special damages. (p. 129.)

RIGHT OF PRIVACY.—Publication of one's picture without his consent for advertising purposes and for the gain of the advertiser is in no sense an exercise of the liberty of the press or of free speech. (p. 130.)

LIBEL.—Though Words are Harmless in Themselves, if in the light of extrinsic facts a meaning is conveyed to the reader which will be calculated to expose the person about whom the words are used to contempt or ridicule, they then become libelous, and an action may be maintained therefor, although no special damages are alleged. (p. 132.)

LIBEL.—Published Words Which Impute to One Language known to his friends and acquaintances to contain false statements are libelous. (p. 132.)

Westmoreland Brothers and M. M. Hirsch, for the plaintiff.

J. L. Hopkins & Sons, for the defendants.

¹⁹³ **COBB, J.** 1-12. The petition really contains two counts; one for a libel, and the other for a violation of the plaintiff's right of privacy. There was no special demurrer raising the objection that the counts were not properly arranged, as there was in *Cooper v. Portner Brew. Co.*, 112 Ga. 894, 38 S. E. 91; and

hence the petition is to be dealt with in relation to its substance, without reference to its form. We will first deal with the general demurrer to the second count, which claimed damages on account of an alleged violation of the plaintiff's right of privacy. The question, therefore, to be determined is whether an individual has a right of privacy which he can enforce and which the courts will protect against invasion. It is to be conceded that prior to 1890 every adjudicated case, both in this country and in England, which might be said to have involved a right of privacy, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence, or the like; and that therefore a claim to a right of privacy, independent of a property or contractual right or some right of a similar nature, had, up to that time, never been recognized in terms in any decision. The entire absence for a long period of time, even for centuries, of a precedent for an asserted right should have the effect to cause the courts to proceed with caution before recognizing the right, for fear that they may thereby invade the province of the law-making power; but such absence, even for all time, is not conclusive of the question as to the existence of the right. The novelty of the complaint is no objection when an injury cognizable by law is shown to have been inflicted on the plaintiff. In such a case, "although there be no precedent, the common law will judge according to the law of nature and the public good." Where the case is new in principle, the courts have no authority to give a remedy, no matter ¹⁸⁴ how great the grievance; but where the case is only new in instance, and the sole question is upon the application of a recognized principle to a new case, "it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago": Broom's Legal Maxims, 8th ed., 193. This results from the application of the maxim "Ubi jus ibi remedium," which finds expression in our code, where it is declared that "For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other": Civ. Code, sec. 4929. The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved than he has to violate the valid regulations of the organized gov-

ernment under which he lives. The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law. This idea is embraced in the Roman's conception of justice, which "was not simply the external legality of acts, but the accord of external acts with the precepts of the law prompted by internal impulse and free volition": McKeldey's Roman Law (Dropsie), sec. 123. It may be said to arise out of those laws sometimes characterized as immutable, "because they are natural, and so just at all times, and in all places, that no authority can either change or abolish them": 1 Domat's Civil Law, by Strahan (Cushing's ed.), 49. It is one of those rights referred to by some law-writers as absolute; "such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it": 1 Blackstone's Commentaries, 123.

¹⁹⁵ Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; and in the second is embraced "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law": 1 Blackstone's Commentaries, 129, 134. While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant

violation of this right would be deprivation of life, yet life itself may be spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy. The right of personal security is not fully accorded by allowing an individual to go through life in possession of all of his members and his body unmarred; nor is his right to personal liberty fully accorded by merely allowing him to remain out of jail or free from other physical restraints. The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint. The term "liberty" is not to be so dwarfed, "but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment, or restraint but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in ¹⁹⁰⁶ any lawful calling, and to pursue any lawful trade or avocation": See Brannon on the Fourteenth Amendment, 111. Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. One may wish to live a life of toil where his work is of a nature that keeps him constantly before the public gaze; while another may wish to live a life of research and contemplation, only moving before the public at such time and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty: See, in this connection, Cyc. Law Dic., Shumaker & Longsdorff, and Bouvier's Law Dictionary, tit. "Liberty."

All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties—to serve as a juror and to testify as a witness, and the like; but when the public duty is

once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy; and this is no new idea in Georgia law. In *Wallace v. Railway Co.*, 94 Ga. 732, 22 S. E. 579, it was said: "Liberty of speech and of writing is secured by the ¹⁸⁷ constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred." The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state by the constitutions of the United States and the state of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law.

While in reaching the conclusion just stated we have been deprived of the benefit of the light that would be shed on the question by decided cases and utterances of law-writers directly dealing with the matter, we have been aided by many sidelights in the law. The *injuria* of the Roman law, sometimes translated "injury" and at other times "outrage," and which is generally understood at this time to convey the idea of legal wrong, was held to embrace many acts resulting in damage for which the law would give redress. It embraced all of those wrongs which were the result of a direct invasion of the rights of the person and the rights of property which are enumerated in all of the commentaries on the common law, and which are so familiar to everyone at this time. But it included more. An outrage was committed not only by striking with the fists, or with the club or lash, but also by shouting until a crowd gathered around one; and it was an outrage, or legal wrong, to merely follow an honest woman or young boy or girl; and it was declared in unequivocal terms that these illustrations were not exhaustive, but that an

injury or legal wrong was committed "by numberless other acts": Sander's Justinian, Hammond's ed., 499; Poste's Inst. Gaius, 3d ed., 449. The punishment of one who had not committed any assault upon another or impeded in any way his right of locomotion, but who merely attracted public attention to the other as he was passing along a public highway or standing upon his private grounds, evidences the fact that the ancient law recognized that a person had a legal right "to be let alone," so long as he was not interfering with the rights of other individuals or of the public. This idea has been carried into the common law, and appears from time to time in various places, a conspicuous instance being in the case of private nuisances resulting from noise which interferes with one's enjoyment of his home, and this, too, where the noise is the result of the carrying on of a lawful occupation. Even in such cases ¹⁹⁸ where the noise is unnecessary, or is made at such times that one would have a right to quiet, the courts have interfered by injunction in behalf of the person complaining: See 2 Wood on Nuisances, 3d ed., 827 et seq. It is true that these cases are generally based upon the ground that the noise is an invasion of a property right, but there is really no injury to the property, and the gist of the wrong is that the individual is disturbed in his right to have quiet. Under the Roman law, "to enter a man's house against his will, even to serve a summons, was regarded as an invasion of his privacy":

- Hunter's Roman Law, 3d ed., 149. This conception is the foundation of the common-law maxim that "every man's house is his castle"; and in Semayne's Case, 5 Coke, 91, 1 Smith's Lead. Cas. 228, where this maxim was applied, one of the points resolved was "That the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose." "Eavesdroppers, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales," were a nuisance at common law and indictable, and were required, in the discretion of the court, to find sureties for their good behavior: 4 Blackstone's Commentaries, 168. The offense consists in lingering about dwelling-houses and other places where persons meet for private intercourse, and listening to what is said, and then tattling it abroad: 10 Am. & Eng. Ency. of Law, 2d ed., 440. A common scold was at common law indictable as a public nuisance to her neighborhood: 4 Blackstone's Commentaries, 168. And the reason for the punishment of such a character was not the protection of any property right of her neighbors,

but the fact that her conduct was a disturbance of their right to quiet and repose, the offense being complete even when the party indicted committed it upon her own premises. Instances might be multiplied where the common law has both tacitly and expressly recognized the right of an individual to repose and privacy. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, which is so fully protected in the constitutions of the United States and of this state (Civ. Code, secs. 5713, 6017), is not a right created by these instruments, but is an ancient right which, on account of its gross violation at different times, was preserved from such attacks in the future by being made the subject ¹²⁹ of constitutional provisions. The right to search the papers or houses of another for the purpose of enforcing a claim of one individual against another in a civil proceeding, or in the maintenance of a mere private right, was never recognized at common law, but such search was confined entirely to cases of public prosecutions; and even in those cases the legality of the search was formerly doubted, and it has been said that it crept into the law by imperceptible practice: 25 Am. & Eng. Ency. of Law, 2d ed., 145. The refusal to allow such search as an aid to the assertion of a mere private right, and its allowance sparingly to aid in maintaining the rights of the public, is an implied recognition of the existence of a right of privacy; for the law on the subject of unreasonable searches cannot be based upon any other principle than the right of a person to be secure from invasion by the public into matters of a private nature which can only be properly termed his right of privacy.

The right of privacy, however, like every other right that rests in the individual, may be waived by him, or by anyone authorized by him, or by anyone whom the law empowers to act in his behalf, provided the effect of his waiver will not be such as to bring before the public those matters of a purely private nature which express law or public policy demands shall be kept private. This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only to such an extent as may be legitimately necessary and proper in dealing with the matter which has brought about the waiver. It may be waived for one purpose and still asserted for another; it may be waived in behalf of one class and retained as against another class; it may be waived as to one individual and retained as against all other persons. The most striking illustration of a waiver is where one either seeks or allows himself to be presented

as a candidate for public office. He thereby waives any right to restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon his qualifications for the office or the advisability of imposing upon him the public trust which the office carries. But even in this case the waiver does not extend into those matters and transactions of private life which are wholly foreign and can throw no light whatever upon the question as to his competency for the office or the propriety ²⁰⁰ of bestowing it upon him. One who holds public office makes a waiver of a similar character—that is, that his life may be subjected at all times to the closest scrutiny in order to determine whether the rights of the public are safe in his hands; but beyond this the waiver does not extend. So it is in reference to those belonging to the learned professions, who by their calling place themselves before the public and thereby consent that their private lives may be scrutinized for the purpose of determining whether it is to the interest of those whose patronage they seek to place their interests in their hands. In short, any person who engages in any pursuit or occupation or calling which calls for the approval or patronage of the public submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise and proper and expedient to accord to him the approval or patronage which he seeks.

It may be said that to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended and the rights of others and of the public began. This affords no reason for not recognizing the liberty of privacy and giving to the person aggrieved legal redress against the wrongdoer in a case where it is clearly shown that a legal wrong has been done. It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand and the right of another individual or of the public on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual. In regard to cases that may arise under the right of privacy, as in cases that arise under other rights where the line of demarcation is to be determined, the safeguard of the individual on the one hand and of the public on the other is the wisdom and integrity of the judiciary. Each person has a liberty of privacy, and every other person has as against him liberty in reference to other matters, and the line where these liberties impinge upon each other may in a given case be hard to define; but that such

a case may arise can afford no more reason for denying to one his liberty of privacy than it would to deny to another his liberty, whatever it may be. In every action for a tort it is necessary for the court to determine whether the right claimed has a legal existence, and for the jury to determine whether such right has been ²⁰¹ invaded, and to assess the damage if their finding is in favor of the plaintiff. This burden which rests upon the court in every case of the character referred to is all that will be imposed upon it in actions brought for a violation of the right of privacy. No greater difficulties will be encountered in such cases in determining the existence of the right than often will be encountered in determining the existence of other rights sought to be enforced by action. The courts may proceed in cases involving the violation of a right of privacy as in other cases of a similar nature, and the juries may in the same manner proceed to a determination of those questions which the law requires to be submitted for their consideration. With honest and fearless trial judges to pass in the first instance upon the question of law as to the existence of the right in each case, whose decisions are subject to review by the court of last resort, and with fair and impartial juries to pass upon the questions of fact involved and assess the damages in the event of a recovery, whose verdict is, under our law, in all cases subject to supervision and scrutiny by the trial judge, who may, within the limits of a legal discretion, control their findings, there need be no more fear that the right of privacy will be the occasion of unjustifiable litigation, oppression or wrong than that the existence of many other rights in the law would bring about such results.

The liberty of privacy exists, has been recognized by the law, and is entitled to continual recognition. But it must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties, as well as the rights of any person who may be properly interested in the matters which are claimed to be of purely private concern. Publicity in many cases is absolutely essential to the welfare of the public. Privacy in other matters is not only essential to the welfare of the individual, but also to the well-being of society. The law stamping the unbreakable seal of privacy upon communications between husband and wife, attorney and client, and similar provisions of the law, is a recognition, not only of the right of privacy, but that for the public good some matters of private concern are not to be made public even with the consent of those interested. It therefore follows from what has been said that a

violation of the right of privacy is a direct invasion of a legal ²⁰² right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover: Civ. Code, sec. 3807. In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character; and if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right.

The stumbling-block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other. The right to convey one's thoughts by writing or printing grows out of but does not enlarge in any way the natural right of speech; it simply authorizes one to take advantage of those mediums of expression which the ingenuity of man has contrived for broadening and making more effective the influences of that which was formerly confined to mere oral utterances. The right to speak and write and print has been, at different times in the world's history, seriously invaded by those who, for their own selfish purposes, desired to take away from others such privileges, and consequently these rights have been the subject of provisions in the constitutions of the United States and of this state. The constitution of the United States prohibits Congress from passing any law "abridging the freedom of speech or of the press": Civ. Code, sec. 6014. The constitution of this state declares: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." Judge Cooley says: "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply ²⁰³ not only liberty to publish, but complete immunity from

legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted": Cooley's Constitutional Limitations, 5th ed., 521. In *Rex v. St. Asaph*, 3 Term Rep. 428, Lord Mansfield said: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." Chancellor Kent, while judge of the supreme court of New York, in *People v. Croswell*, 3 Johns. Cas. 336, 394, adopted, as a definition of the phrase "liberty of the press," what was said by General Hamilton in his brief in that case, where it was set forth that "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals"; and the learned jurist declared that this definition was perfectly correct, comprehensive and accurate. Mr. Justice Story defined the phrase to mean "that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so, always, that he does not injure any other person in his rights, person, property or reputation; and so, always, that he does not thereby disturb the public peace or attempt to subvert the government": Story on the Constitution, sec. 1880. See, also, 18 Am. & Eng. Ency. of Law, 2d ed., 1125.

The constitution of this state declares what is meant by liberty of speech and liberty of the press, in the following words: "Any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty": Civ. Code, sec. 5712. The right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege by invading the legal rights of others. The constitution uses the word "sentiments," but it is used in the sense of thoughts, ideas, opinions. To make intelligent, forceful and effective an expression of opinion it may be necessary to refer to the life, conduct and character of a person; and so long as the truth is adhered to, the right of ²⁰⁴ privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person and the manner in which he is referred to is reasonably and legitimately proper in an expression

of opinion on the subject that is under investigation. It will therefore be seen that the right of privacy must in some particulars yield to the right of speech and of the press. It is well recognized that slander is an abuse of the liberty of speech, and that a libel is an abuse of the liberty to write and print; but it is nowhere expressly declared in the law that these are the only abuses of such rights. And that the law makes the truth in suits for slander and in prosecutions and suits for libel a complete defense may not necessarily make the publication of the truth the legal right of every person, nor prevent it from being in some cases a legal wrong. The truth may be spoken, written or printed about all matters of a public nature, as well as matters of a private nature in which the public has a legitimate interest. The truth may be uttered and printed in reference to the life, character and conduct of individuals whenever it is necessary to the full exercise of the right to express one's sentiments on any and all subjects that may be proper matter for discussion. But there may arise cases where the speaking or printing of the truth might be considered an abuse of the liberty of speech and of the press; as, in a case where matters of purely private concern, wholly foreign to a legitimate expression of opinion on the subject under discussion, are injected into the discussion for no other purpose and with no other motive than to annoy and harass the individual referred to. Such cases might be of rare occurrence; but if such should arise, the party aggrieved may not be without a remedy. The right of privacy is unquestionably limited by the right to speak and print. It may be said that to give liberty of speech and of the press such wide scope as has been indicated would impose a very serious limitation upon the right of privacy; but if it does, it is due to the fact that the law considers that the welfare of the public is better subserved by maintaining the liberty of speech and of the press than by allowing an individual to assert his right of privacy in such a way as to interfere with the free expression of one's sentiments and the publication of every matter in which the public may be legitimately interested. In many cases the law requires the individual to surrender some of his natural and private rights for the benefit of the public; and this is true in reference to some phases of the right of privacy as well as other legal rights. Those to whom the right to speak and write and print is guaranteed must not abuse this right; nor must one in whom the right of privacy exists abuse this right. The law will no more permit an abuse by the one than by the other.

Liberty of speech and of the press is and has been a useful instrument to keep the individual within limits of lawful, decent and proper conduct; and the right of privacy may be well used within its proper limits to keep those who speak and write and print within the legitimate bounds of the constitutional guaranties of such rights. One may be used as a check upon the other; but neither can be lawfully used for the other's destruction.

There is nothing in the ruling made in the present case to conflict with the decision in *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 15 S. E. 901, 17 L. R. A. 430. It was held in that case that in an action against a telegraph company for a failure to deliver a message in due time, thereby preventing the sender from going to the bedside of his sick brother, damages on account of mental pain and suffering could not be recovered. The effect of that decision is simply that in an action upon a contract, or in an action sounding in tort for a breach of duty growing out of the contract, damages for mental pain and suffering cannot be recovered, when no other damages have been sustained. Mr. Justice Lumpkin, in his opinion, distinctly recognizes that where there has been an invasion of a right from which the law would presume damages to flow, additional damages for pain and suffering might be recovered.

It seems that the first case in this country where the right of privacy was invoked as a foundation for an application to the courts for relief was the unreported case of *Manola v. Stevens*, which was an application for injunction to the supreme court of New York, filed on June 15, 1890. The complainant alleged that while she was playing in the Broadway theater, dressed as required by her role, she was, by means of a flashlight, photographed surreptitiously and without her consent, from one of the boxes by the defendant; and she prayed that an injunction issue to restrain the use of the photograph. An interlocutory injunction was granted *ex parte*. At the time set for a hearing there was ²⁰³ no appearance for the defendant, and the injunction was made permanent: See 4 Harv. Law Rev. 195, note 7. The article in this magazine which refers to the case above mentioned appeared in 1890, and was written by Samuel D. Warren and Lewis D. Brandeis. In it the authors ably and forcefully maintained the existence of a right of privacy, and the article attracted much attention at the time. It was conceded by the authors that there was no decided case in which the right of privacy was distinctly asserted and recognized, but it was as-

asserted that there were many cases from which it would appear that this right really existed, although the judgment in each case was put upon other grounds when the plaintiff was granted the relief prayed. The cases especially referred to were *Yovatt v. Wingard*, [1820] 1 Jacob & W. 394; *Abernethy v. Hutchinson*, [1825] 3 L. J. Ch. 209; *Prince Albert v. Strange*, [1849] 2 De Gex & S. 652; *Tuck v. Priester*, [1887] 19 Q. B. D. 639; *Pollard v. Photograph Co.*, [1888] 40 Ch. D. 345. The first three of these cases related respectively to the publication of recipes, writings and etchings, which the complainant in each case alleged were either published or about to be published without his consent; and an injunction was granted in the first case upon the ground that the publication of the recipes was the result of a breach of trust and confidence, and in the other two cases upon this ground as well as upon the ground that the complainant had a property right in the writings and etchings. The *Tuck* and *Pollard* cases dealt with the publication of pictures, the former being where one was employed to make copies of a picture owned by the plaintiff, and the latter where a photographer was employed to take a photograph of the complainant; the defendant in each instance being about to use the copies in his possession without the consent of the plaintiff. An injunction was granted in the *Tuck* case on the ground that the sale of the copies would be a breach of contract, and in the *Pollard* case the decision was rested upon the right of property, although a finding that the publication would be a breach of contract and of trust was authorized. Attention is called to the fact that in *Prince Albert's* case, while the decision was put upon the ground above stated, Lord Cottenham declared that with respect to the acts of the defendants "privacy is the right invaded." It must be conceded that the numerous cases decided before 1890, ²⁰⁷ in which equity has interfered to restrain the publication of letters, writings, papers, etc., have all been based either upon the recognition of a right of property or upon the fact that the publication would be a breach of contract, confidence or trust. It is well settled that if any contract, or property right, or trust relation has been violated, damages are recoverable. There are many cases which sustain such a doctrine.

Cases involving the right of privacy, that have arisen since 1890, will now be considered. In *Mackenzie v. Mineral Springs Co.* (1891), 27 Abb. N. C. 402, 18 N. Y. Supp. 240, an injunction was granted by the New York supreme court, special

term, at the instance of a physician, to restrain the publication of an unauthorized recommendation of a medical preparation under his name, upon the grounds that such publication would be injurious to his professional reputation, and "an infringement of his right to the sole use of his own name," and prejudicial to public interest. While this case was not based upon the right of privacy, that right was impliedly recognized. The first reported case in which the right of privacy was expressly recognized was the case of *Schuyler v. Curtis* (1892), 15 N. Y. Supp. 787, 40 N. Y. St. Rep. 289, where Justice O'Brien of the supreme court of New York granted an injunction to restrain the making and public exhibition of a statue of a deceased person, upon the ground that it was not shown that she was a public character. This judgment was affirmed by the supreme court (general term) by Van Brunt and Barrett, JJ., in an opinion by the former in which the rule was laid down that a person, whether a public character or not, has a right to enjoin the making and placing on exhibition of his statue; and he being dead, a relative has this right: 19 N. Y. Supp. 264, 64 Hun, 594. When the case came before the supreme court (special term), in 1893, the judgment of the general term was followed, and in an opinion by Ingraham, J., the rule was announced that a court of equity, at the instance of one of the relatives of a deceased person, will enjoin the making and placing on public exhibition of a statue of the deceased by unauthorized persons, which the complaining relatives unite in alleging will cause them pain and distress and will be considered by them a disgrace; and this too whether or not the court be of the opinion that the proposed representation should produce the alleged effect; and that such unauthorized ²⁰⁸ act is not within the provision of the state constitution which secures to each person the right to freely speak, write, and publish his sentiments on all subjects: 24 N. Y. Supp. 509, 512, 54 N. Y. St. Rep. 936, 70 Hun, 598. The statue which it was proposed to exhibit was in no sense a caricature, and the exhibition of the same would not have been a libel upon the deceased. In 1893, in *Marks v. Jaffa*, 26 N. Y. Supp. 908, 6 Misc. Rep. 290, an injunction was granted by the superior court of New York City (special term) to restrain the publication of a picture of the plaintiff in the defendant's newspaper, with an invitation to the readers of the paper to vote on the question of the popularity of the plaintiff as compared with another person whose picture was also published in such

newspaper. McAdam, J., in the opinion said: "No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone for such a purpose without his consent." The decision was apparently based upon the case of *Schuyler v. Curtis*, above referred to. In 1893 an application was made to Judge Colt, of the United States circuit court for the district of Massachusetts, by the widow and children of George H. Corliss, to enjoin the publication and sale of a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill did not allege that the publication contained any matter which was scandalous, libelous or false, or that it affected any right of property, but the relief was prayed upon the ground that the publication was an injury to the feelings of the plaintiffs and against their express prohibition. An injunction was refused as to the biography, on the ground that Mr. Corliss was a public man in the same sense as authors or artists are public men; but an injunction was granted as to the publication of the picture, upon the ground that the publisher had obtained a copy of the photograph upon certain conditions, and the publication would be a violation of those conditions. Subsequently a motion was made to dissolve the injunction, on the ground that the photograph from which the copies were made was not obtained in the manner above referred to, but from a copy which was obtained in a lawful way; and the injunction was dissolved upon the ground that neither a public character nor his family after his death has a right to enjoin the publication of his portrait, when the publication would not be a violation of a contract, or a breach of trust ²⁰⁰ or confidence. Judge Colt in the opinion uses this language: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk": *Corliss v. Walker*, 57 Fed. 434, 64 Fed. 280, 31 L. R. A. 283. It is to be noted that the ruling in this case goes no further than that a public character has so waived his right of privacy, if he ever had it, as to authorize the publication of his life and his picture, not only without his consent, but also without the consent of his family after

his death, when there is nothing in the biography or the picture which will reflect discredit upon the subject.

In 1894, in *Murray v. Gast Lithographic etc. Co.*, 28 N. Y. Supp. 271, 31 Abb. N. C. 266, 8 Misc. Rep. 36, a case decided by the court of common pleas of New York city and county, it was held that a person cannot sue to enjoin the publication of a portrait of his infant child, or for damages caused thereby. This decision was undoubtedly correct; for if there was any right to sue for a violation of the right of privacy, the cause of action was in the child and not in the parent. In 1895 the case of *Schuyler v. Curtis* reached the court of appeals of New York, and the judgment of the lower court was reversed: 147 N. Y. 436, 49 Am. St. Rep. 671, 42 N. E. 22, 31 L. R. A. 286. It was held that if any right of privacy, in so far as it includes the right to prevent the public from making pictures or statues commemorative of the worth and services of the subject, exist at all, it does not survive after death and cannot be enforced by the relatives of the deceased. The opinion was delivered by Judge Peckham, in the course of which he used this language: "If the defendants had projected such a work in the lifetime of Mrs. Schuyler, it would perhaps have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position toward the public as would have authorized such action by anyone so long as it was in opposition to her wishes." Judge Gray dissented, saying, in his opinion: "I cannot see why the right of privacy is not a form of property, as much as is the right of ²¹⁰ complete immunity of one's person." This case settles nothing as to the existence of a right of privacy, but merely rules that, if it exists at all, it is a personal right and dies with the person. In *Atkinson v. Doherty*, 121 Mich. 372, 80 Am. St. Rep. 507, 80 N. W. 285, 46 L. R. A. 219, a case decided in 1899, the supreme court of Michigan held that the use of the name and likeness of a deceased person as a label for a brand of cigars cannot be restrained by injunction, so long as they do not constitute a libel. Many, if not all, the cases above referred to in reference to the right of privacy are mentioned and reviewed in this case. While this decision apparently lays down the broad proposition that the right of privacy does not exist to such an extent as to prohibit one from publishing the picture of another without his consent, in reality the only question necessary to have been decided was whether this right of privacy was personal and died with the person; and therefore the decision on

its facts is authoritative no further than the decision of the New York court of appeals in *Schuyler v. Curtis*. While the right of privacy is personal, and may die with the person, we do not desire to be understood as assenting to the proposition that the relatives of the deceased cannot, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an invasion into the affairs of his private life after his death. This question is not now involved, but we do not wish anything said to be understood as committing us in any way to the doctrine that against the consent of relatives the private affairs of a deceased person may be published and his picture or statue exhibited. We call attention to the ruling in *Jacobus v. Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853, that damages may be recovered by the relative of a deceased person who is the owner of an easement of burial in a cemetery lot, for the disinterment of the dead body; and that if the injury has been wanton and malicious, or the result of gross negligence and a reckless disregard of the rights of others, exemplary damages may be awarded, in estimating which the injury to the natural feelings of the plaintiff may be taken into consideration. If damages for wounded feelings can be recovered in such a case for the wanton removal of the bleaching bones of the deceased relative, it would seem for a stronger reason that such damages ought to be allowed to be recovered when those matters which the deceased had jealously guarded from the public during ²¹¹ his lifetime, and his portrait, which was likewise protected from the public gaze, are made public property after his death.

In *Roberson v. Rochester Folding Box Co.* (1901), 64 App. Div. 30, 71 N. Y. Supp. 876, decided by the appellate division of the supreme court of New York, it appeared that lithographic likenesses of a young woman, bearing the words "Flour of the Family," were without her consent printed and used by a flour milling company to advertise its goods. The declaration alleged that in consequence of the circulation of such lithographs the plaintiff's good name had been attacked, and she had been greatly humiliated and made sick and been obliged to employ a physician, and prayed for an injunction against the further use of the lithographs and for damages. It was held that the declaration was not demurrable. It was also held that if a right of property was necessary to entitle the plaintiff to maintain the action, the case might stand upon the right of property which everyone has in his own body. This case came before

the court of appeals of New York in 1902, and the judgment was reversed: 171 N. Y. 540, 89 Am. St. Rep. 828, 64 N. E. 442, 59 L. R. A. 478. This is the first and only decision by a court of last resort involving directly the existence of a right of privacy. The decision was by a divided court; Chief Judge Parker and three of the associate judges concurring in a ruling that the complaint set forth no cause of action either at law or in equity; while Judge Gray, with whom concurred two of the associate judges, filed a dissenting opinion, in which it was maintained that the injunction should have been granted. While the ruling of the majority is limited in its effect to the unwarranted publication of the picture of another for advertising purposes, the reasoning of Judge Parker goes to the extent of denying the existence in the law of a right of privacy, "founded upon the claim that a man has a right to pass through this world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise." The reasoning of the majority is, in substance, that there is no decided case either in England or in this country in which such a right is distinctly recognized; that every case that might be relied on to establish the right was placed expressly upon other grounds, not involving the application of this right in any sense; that the right is not referred to by the commentators ²¹² and writers upon the common law or the principles of equity; that the existence of the right is not to be legitimately inferred from anything that is said by any of such writers; and that a recognition of the existence of the right would bring about a vast amount of litigation; and that in many instances where the right would be asserted it would be difficult, if not impossible, to determine the line of demarcation between the plaintiff's right of privacy and the well-established rights of others and of the public. For these reasons the conclusion is reached that the right does not exist, has never existed, and cannot be enforced as a legal right. We have no fault to find with what is said by the distinguished and learned judge who voiced the views of the majority, as to the existence of decided cases, and agree with him in his analysis of the various cases which he reviews, that the judgment in each was based upon other grounds than the existence of a right of privacy. We also agree with him so far as he asserts that the writers upon the common law and the principles of equity do not in express terms refer to this right. But we are utterly at variance with him in his con-

clusion that the existence of this right cannot be legitimately inferred from what has been said by commentators upon the legal rights of individuals, and from expressions which have fallen from judges in their reasoning in cases where the exercise of the right was not directly involved. So far as the judgment in the case is based upon the argument *ab inconvenienti*, all that is necessary to be said is that this argument has no place in the case if the right invoked has an existence in the law. But if it were proper to use this argument at all, it could be said with great force that as to certain matters the individual feels and knows that he has a right to exercise the liberty of privacy, and that he has a right to resent any invasion of this liberty; and if the law will not protect him against invasion, the individual will, to protect himself and those to whom he owes protection, use those weapons with which nature has provided him as well as those which the ingenuity of man has placed within his reach. Thus the peace and good order of society would be disturbed by each individual becoming a law unto himself to determine when and under what circumstances he should avenge the outrage which has been perpetrated upon him or a member of his family. The true lawyer, when called to the discharge of judicial functions, has ²¹⁸ in all times, as a general rule, displayed remarkable conservatism; and wherever it was legally possible to base a judgment upon principles which had been recognized by a long course of judicial decision, this has been done, in preference to applying a principle which might be considered novel. It was for this reason that the numerous cases, both in England and in this country, which really protected the right of privacy were not placed upon the existence of this right, but were allowed to rest upon principles derived from the law of property, trust and contract. Any candid mind will, however, be compelled to concede that in order to give relief in many of those cases it required a severe strain to bring them within the recognized rules which were sought to be applied. The desire to avoid the novelty of recognizing a principle which had not been theretofore recognized was avoided in such cases by the novelty of straining a well-recognized principle to cover a state of facts to which it had never before been applied. This conservatism of the judiciary has sometimes unconsciously led judges to the conclusion that because the use was novel the right claimed did not exist. With all due respect to Chief Judge Parker and his associates who concurred with him, we think the conclusion reached by them was the re-

sult of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel. The valuable influence upon society and upon the welfare of the public of the conservatism of the lawyer, whether at the bar or upon the bench, cannot be overestimated; but this conservatism should not go to the extent of refusing to recognize a right which the instincts of nature prove to exist, and which nothing in judicial decision, legal history, or writings upon the law can be called to demonstrate its nonexistence as a legal right.

We think that what should have been a proper judgment in the Roberson case was that contended for by Judge Gray in his dissenting opinion, from which we quote as follows: "The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the ²¹⁴ absolute right to be let alone: Cooley on Torts, 29. The principle is fundamental, and essential in organized society, that everyone, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. . . . As I have suggested, that the exercise of this peculiar preventive power of a court of equity is not found in some precisely analogous case furnishes no valid objection at all to the assumption of jurisdiction, if the particular circumstances of the case show the performance, or the threatened performance, of an act by a defendant, which is wrongful, because constituting an invasion, in some novel form, of a right to something which is, or should be conceded to be, the plaintiff's, and as to which the law provides no adequate remedy. It would be a justifiable exercise of power, whether the principle of interference be rested upon analogy to

some established common-law principle, or whether it is one of natural justice. . . . Instantaneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form, in invitum their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial, or other, uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but ²¹⁵ against the display and use thereof for another's commercial purposes or gain. The proposition is to me an inconceivable one that these defendants may unauthorizedly use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity. Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration, by the great commentators upon the law, of a common-law principle which would precisely apply to and govern the action; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property which has been invaded by the defendant's acts. Property is not, necessarily, the thing itself which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and so it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle which is ap-

plicable is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. . . .

"I think that this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. . . . The right to grant the injunction does not depend upon the existence of property which one has in some contractual form. It depends²¹⁶ upon the existence of property in any right which belongs to a person. . . . It would be, in my opinion, an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. The injury to the plaintiff is irreparable; because she cannot be wholly compensated in damages for the various consequences entailed by the defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages is not material; for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents."

The effect of the reasoning of the learned judge whose words have just been quoted is to establish conclusively the correctness of the conclusion which we have reached, and we prefer to adopt as our own his reasoning in his own words rather than to paraphrase them into our own. The decision of the court of appeals of New York in the Roberson case gave rise to numerous articles in the different law magazines of high standing in the country, some by the editors and others by contributors. In some the conclusion of the majority of the court was approved; in others the views of the dissenting judges were commended; and in still others the case and similar cases were referred to as apparently establishing that the claim of the majority was correct, but regret was expressed that the necessity was such that the courts could not recognize the right asserted. An editorial in the *American Law Review* (volume 36, page 636) said: "The

decision under review shocks and wounds the ordinary sense of justice of mankind. We have heard it alluded to only in terms of regret." There were also articles referring to other cases cited which deal with the question as to the existence of a right of privacy: See 36 Am. Law Rev. 614, 634; 34 Am. Law Reg., N. S., 134; 41 Am. Law Reg. 669; 1 Col. Law Rev. 491; 2 Col. Law Rev. 437; 44 Alb. L. J. 428; 55 Cent. L. J. 123; 57 Cent. L. J. 361. See, also, North American Review (September, 1902), 361; 22 Am. & Eng. Ency. of Law, 2d ed., 1311; note to *Roberson v. Box Co.*, 89 Am. St. Rep. 844; note to *Corliss v. Walker*, 31 L. R. A. 283. ²¹⁷ Articles on the subject of the right of privacy have also appeared in 12 Yale L. J. 35, 24 Nat. Corp. Rep. 709, 25 Nat. Corp. Rep. 183, 415, 6 Law Notes, 79, 36 Chic. L. N. 126, and Case & Comment (July, 1902); but these articles were not accessible to us at the time this opinion was written.

As we have already said, cases may arise where it is difficult to determine on which side of the line of demarcation which separates the right of privacy from the well-established rights of others they are to be found; but we have little difficulty in arriving at the conclusion that the present case is one in which it has been established that the right of privacy has been invaded, and invaded by one who cannot claim exemption under the constitutional guaranties of freedom of speech and of the press. The form and features of the plaintiff are his own. The defendant insurance company and its agent had no more authority to display them in public for the purpose of advertising the business in which they were engaged than they would have had to compel the plaintiff to place himself upon exhibition for this purpose. The latter procedure would have been unauthorized and unjustifiable, as everyone will admit; and the former was equally an invasion of the rights of his person. Nothing appears from which it is to be inferred that the plaintiff has waived his right to determine for himself where his picture should be displayed in favor of the advertising right of the defendants. The mere fact that he is an artist does not of itself establish a waiver of this right, so that his picture might be used for advertising purposes. If he displayed in public his works as an artist, he would of course subject his works and his character as an artist, and possibly his character and conduct as a man, to such scrutiny and criticism as would be legitimate and proper to determine whether he was entitled to rank as an artist and should be accorded recognition as such by the public.

But it is by no means clear that even this would have authorized the publication of his picture. The constitutional right to speak and print does not necessarily carry with it the right to reproduce the form and features of an individual. The plaintiff was in no sense a public character, even if a different rule in regard to the publication of one's picture should be applied to such characters. It is not necessary in this case to hold, nor are we prepared to do so, that the mere fact that a man ²¹⁸ has become what is called a public character, either by aspiring to public office, or by holding public office, or by exercising a profession which places him before the public, or by engaging in a business which has necessarily a public nature, gives to everyone the right to print and circulate his picture. To use the language of Hooker, J., in *Atkinson v. Doherty*, 121 Mich. 272, 80 Am. St. Rep. 507, 80 N. W. 285, 46 L. R. A. 219: "We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that because he permits his picture to be published by one person, and for one purpose, he is forever thereafter precluded from enjoying any of his rights." It may be that the aspirant for public office, or one in official position, impliedly consents that the public may gaze not only upon him but upon his picture; but we are not prepared now to hold that even this is true. It would seem to us that even the President of the United States in the lofty position which he occupies has some rights in reference to matters of this kind, which he does not forfeit by aspiring to or accepting the highest office within the gift of the people of the several states. While no person who has ever held this position, and probably no person who has ever held public office, has ever objected, or ever will object, to the reproduction of his picture in reputable newspapers, magazines and periodicals, still it cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed in places where he would never go to be gazed upon, at times when and under circumstances where, if he were personally present, the sensibilities of his nature would be severely shocked. If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon-keeper, or decorate the walls of a brothel. By becoming a member of society, neither

man nor woman can be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas. The conclusion reached by us seems to be so thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law, and so thoroughly in ²¹⁹ harmony with those principles as molded under the influence of American institutions, that it seems strange to us that not only four of the judges of one of the most distinguished and learned courts of the Union, but also lawyers of learning and ability, have found an insurmountable stumbling block in the path that leads to a recognition of the right which would give to persons like the plaintiff in this case, and the young woman in the Roberson case, redress for the legal wrong, or, what is by some of the law-writers called, the outrage, perpetrated by the unauthorized use of their pictures for advertising purposes.

What we have ruled cannot be in any sense construed as an abridgment of the liberty of speech and of the press as guaranteed in the constitution. Whether the reproduction of a likeness of another which is free from caricature can in any sense be declared to be an exercise of the right to publish one's sentiments, certain it is that one who, merely for advertising purposes and from mercenary motives, publishes the likeness of another without his consent, cannot be said, in so doing, to have exercised the right to publish his sentiments. The publication of a good likeness of another, accompanying a libelous article, would give a right of action. The publication of a caricature is generally, if not always, a libel. Whether the right to print a good likeness of another is an incident to a right to express one's sentiments in reference to a subject with which the person whose likeness is published is connected, is a question upon which we cannot, under the present record, make any authoritative decision; but it would seem that a holding that the publication of a likeness under such circumstances, without the consent of the person whose likeness is published, is allowable, would be giving to the word "sentiments" a very extended meaning. The use of a pen portrait might be allowable in some cases where the use of an actual portrait was not permissible. There is in the publication of one's picture for advertising purposes not the slightest semblance of an expression of an idea, a thought, or an opinion, within the meaning of the constitutional provision which guarantees to a person the right to publish his

sentiments on any subject. Such conduct is not embraced within the liberty to print, but is a serious invasion of one's right of privacy, and may in many cases, according to the circumstances of the publication and the uses to which it is put, cause damages ²²⁰ to flow which are irreparable in their nature. The knowledge that one's features and form are being used for such a purpose and displayed in such places as such advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.

So thoroughly satisfied are we that the law recognizes within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability; just as in the present day we stand amazed that Lord Coke should have combated, with all the force of his vigorous nature, the proposition that the court of chancery had jurisdiction to entertain an application for injunction to restrain the enforcement of a common-law judgment which had been obtained by fraud; and that Lord Hale, with perfect composure of manner and complete satisfaction of soul, imposed the death penalty for witchcraft upon ignorant and harmless women.

13-15. It is now to be determined whether what may be called the first count in the petition set forth a cause of action for libel, as against a general demurrer. The publication did not mention the plaintiff's name, but it did contain a likeness of him that his friends and acquaintances would readily recognize as his, and the words of the publication printed under the likeness were put into the mouth of him whose likeness was published. It was, so far as his friends and acquaintances were concerned, the same as if his name had been signed to the

printed words. In these words he was made to say, in effect, that he had secured insurance with the defendant company, that on this account his family were protected, ²²¹ and he was receiving an income from an annual dividend and paid-up policies. These words are harmless in themselves. Standing alone, they contain nothing and carry no inference of anything that is disgraceful, to be ashamed of, or calculated to bring one into reproach. When in an action for libel the words declared on are harmless in themselves, and the petition alleges no extrinsic facts which would show that the words might be taken in other than their ordinary sense, a cause of action for a libel is not sufficiently set forth: *Stewart v. Wilson*, 23 Minn. 449. If in the light of extrinsic facts words apparently harmless are such as to convey to the mind of the reader who is acquainted with the extrinsic facts a meaning which will be calculated to expose the person about whom the words are used to contempt or ridicule, then such harmless words become libelous, and an action is well brought although no special damages may be alleged: *Behre v. Cash Register Co.*, 100 Ga. 213, 26 Am. St. Rep. 320, 27 S. E. 986; *Holmes v. Clisby*, 118 Ga. 823, 45 S. E. 684; *Central Ry. Co. v. Sheftall*, 118 Ga. 865, 45 S. E. 687. It is alleged that the plaintiff did not have, and never had, a policy of insurance with the defendant company; and that this fact was known to his friends and acquaintances. In the light of these allegations, the words attributed to the plaintiff become absolutely false, and those who are acquainted with the facts, upon reading the statement, would naturally ask, For what purpose was this falsehood written? It was either gratuitous or it was for a consideration; and whichever conclusion might be reached, the person to whom the words were attributed would become contemptible in the mind of the reader. He would become at once a self-confessed liar. If he lied gratuitously, he would receive and merit the contempt of all persons having a correct conception of moral principles. If he lied for a consideration, he would become odious to every decent individual: See *Colvard v. Black*, 110 Ga. 643, 36 S. E. 80. It seems clear to us that a jury could find from the facts alleged that the publication, in the light of the extrinsic facts, was libelous; and the plaintiff was entitled to have this question submitted to the jury: *Brazley v. Reid*, 68 Ga. 380; *Holmes v. Clisby*, 121 Ga. 241, 48 S. E. 934.

16. Having reached the conclusion that each count in the petition set forth a cause of action as against a general de-

murrer, it remains now to be determined whether any of the objections raised in the special demurrer were well taken. It is said that there ²²² was a misjoinder of parties, in that Adams should not be joined with the other defendants, or either of them, in the count for libel, or the count for a violation of the right of privacy. The allegations of the petition are sufficient to show that the three defendants were joint wrongdoers, and were therefore not improperly joined in the same action. A further objection was that there was a misjoinder of causes of action, in that there was an attempt to join a cause of action *ex delicto* (the libel) with a cause of action *ex contractu* (the violation of the right of privacy). While the petition does allege that the violation of the right of privacy was the result of a breach of trust or confidence reposed in Adams, still it is distinctly charged that it is a trespass upon his right of privacy; and construing the petition as a whole, it is manifest that the pleader intended to bring an action for a tort. It was further objected that no facts were alleged from which the charge of malice can be legally drawn, and that it did not appear from the allegations of the petition that any ridicule befell petitioner by reason of the publication. The publication, in the light of the extrinsic facts, being a libel, the law would infer malice, and it was not necessary to allege that any ridicule actually befell the petitioner; all that is necessary to constitute the publication a libel being that the statements should be of such a character as have a tendency to bring the plaintiff into contempt or ridicule. The court erred in dismissing the petition.

Judgment reversed.

All the justices concur.

The Right of Privacy and the manner of enforcing its recognition are discussed in the monographic note to *Roberson v. Rochester Folding Box Co.*, 89 Am. St. Rep. 844-853.

SEABOARD AIR-LINE RAILWAY v. RAINEY.

[122 Ga. 307, 50 S. E. 88.]

RAILROADS—Failure to Awaken Sleeping Passengers.—It is not negligence on the part of a railway company to fail to awaken a sleeping passenger, to advise him that his destination has been reached. (p. 135.)

RAILROADS—Failure to Announce Station to Sleeping Passengers.—Although it is the duty of a railway company, in order to afford a passenger an opportunity to leave the train at the point of his destination, to have the name of such station announced upon the arrival of the train, yet the failure of the company to make such announcement does not make it liable to a passenger who is sleeping soundly and is not misled by such failure, although he alleges that he was "very easy to awake from sleep," and that if the arrival of the train at the station had been announced, such announcement itself would have been "sufficient to arouse petitioner from sleep." (pp. 135, 136.)

Crovatt & Whitfield, for the plaintiff in error.

F. H. Harris, for the defendant in error.

307 FISH, P. J. W. H. Rainey brought an action against the Seaboard Air-Line Railway for damages. In the view that we take of the case, the material allegations of the petition are as follows: Plaintiff purchased a ticket from defendant's agent at Savannah, Georgia, for passage from that point to Brunswick, Georgia, over defendant's road from Savannah to Thalman and over the Atlantic and Birmingham Railroad from Thalman to Brunswick. After leaving Savannah, the conductor of defendant's train examined plaintiff's ticket and informed him that he must change cars at Thalman. "Being extremely tired petitioner went to sleep on said car, expecting that the said defendant's said agent would arouse him and notify him of his arrival at Thalman, the place where he was expected to change cars to reach Brunswick. Petitioner is 308 very easy to awake from sleep; and had the said conductor announced the arrival of said train at Thalman, it was itself sufficient to arouse petitioner from sleep, and the conductor did not announce the arrival of said train And petitioner specifically charges that the defendant corporation's conductor in charge of said train nor any agent of the defendant did announce the arrival of said train at Thalman. . . . On the arrival of said train at Thalman, the said conductor nor any agent or employé of the defendant notified petitioner of its arrival, nor did they do anything to awaken petitioner. That so

failing to awake petitioner, or notify him to change cars at Thalman, petitioner was carried by Thalman by the defendant on its said train and carried to Jacksonville, Florida, where he was landed penniless and without the means of obtaining money or accommodation from any person." Both general and special damages were alleged. The defendant demurred, generally and specially, to the petition. The demurrer was overruled, and the defendant excepted.

It is well settled that it is the duty of a railroad company carrying passengers, in order to afford a passenger an opportunity to leave the train at the station of his destination, to have the name of such station announced upon the arrival of the train, and then to stop the train for a sufficient length of time for him to alight with safety: *Southern Ry. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68. But there is no duty on the part of the railroad company to awaken a sleeping passenger, in order to advise him that his destination has been reached and to enable him to get off the train there: *Nunn v. Georgia R. R. Co.*, 71 Ga. 710, 51 Am. Rep. 284. While a demurrer to a petition or declaration is held to admit the truth of all the material, well pleaded facts alleged therein, it does not admit mere inferences therefrom: *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 62 Am. St. Rep. 312, 29 S. E. 219, 40 L. R. A. 253; 6 Ency. of Pl. & Pr. 336. Applying the rule that pleadings should be construed strictly against the pleader, it is questionable whether the petition in the present case positively alleges that no agent of the defendant announced the arrival of the train at Thalman. But granting that such an allegation is substantially set out in the petition, it is still fatally defective, for the reason that it does not appear that the plaintiff was misled thereby. He was asleep when the train arrived at Thalman, and although the petition alleges that had the conductor announced the ³⁰⁹ arrival of the train at that place, such announcement would of itself have been "sufficient to arouse petitioner from sleep," this allegation is a mere inference or conclusion of the plaintiff, so speculative and uncertain as not to amount to a fact well pleaded. In the very nature of things, it was impossible for the plaintiff to know whether the announcement, if it had been made, would have awakened him. It might have had that effect, or it might not. He was in a condition to sleep soundly, as he was "extremely tired," and voluntarily went to sleep, with his mind undisturbed by any apprehension that by so doing he might be carried beyond the

station where he intended to leave the train; for he expected that the conductor "would arouse and notify him of his arrival at Thalman." In order for the plaintiff to have a cause of action, based on the negligence of the railroad company in failing to have an announcement made of the approach of the train to, or its arrival at, Thalman, it should appear, with at least some degree of certainty, that such negligence was the proximate cause of his being carried beyond that station. It does not appear from the allegations of the petition that the plaintiff, if he had been awake, would not have known, without being informed, of the arrival of the train at Thalman. Therefore the fact that he was carried beyond that station and on to Jacksonville, Florida, may have been due to his own negligence in going to sleep. Indeed, it seems more likely that the injury of which he complains was due to his own negligence than it does that it was due to the negligence of the defendant. He was negligent and the defendant was negligent; and whether the negligence of the one or that of the other was the proximate cause of the injury complained of is a question the solution of which is too conjectural and speculative to admit of satisfactory demonstration by proof. In *Southern Ry. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68, it was held that a failure of a railway company to announce to passengers the approach of a train to a regular station would not count against the company, relatively to a passenger who was in no way misled thereby. In that case it appeared that the plaintiff, who sued the railway company for the failure of its servants to announce the station to which she had purchased a ticket, knew of the arrival of the train at her destination, and that therefore she was not misled by a failure to announce the station. The same reasoning applies in the ³¹⁰ present case. For, we think, the failure of a railroad company to duly announce to the passengers upon one of its trains the arrival of such train at a particular station ought not to count against the company, relatively to a passenger who is not able to show by any satisfactory proof that he was misled thereby.

Judgment reversed.

All the justices concur.

The Doctrine of the Principal Case has the support of *Sevier v. Vicksburg etc. R. R. Co.*, 61 Miss. 8, 48 Am. Rep. 74; *Nunn v. Georgia R. R.*, 71 Ga. 710, 51 Am. Rep. 284. Compare, however, *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910; *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 23 Am. St. Rep. 356.

EMPLOYING PRINTERS CLUB v. DOCTOR BLOSSER COMPANY.

[122 Ga. 509, 50 S. E. 353.]

COMBINATIONS in Restraint of Trade.—A combination of individuals engaged in a particular line of business to compel one engaged in a similar business to sell his product at prices fixed by it is contrary to public policy and void. The members of such a combination, individually or collectively, may by appropriate injunction be restrained from wrongfully interfering with the business of the one who is not a member of the combination. (p. 138.)

COMBINATIONS in Restraint of Trade—Liability in Damages. An overt act in furtherance of an illegal combination to create a monopoly and stifle competition in business, resulting in injury to a third person, is actionable, and the members of the combination are liable to the injured person for all damages proximately flowing from their illegal conduct. (p. 141.)

COMBINATIONS in Restraint of Trade—Equitable Relief to Ex-member.—An ex-member of an illegal combination to stifle trade will not be denied relief in a court of equity against a subsequent illegal act of such combination resulting in damage to him. (p. 142.)

COMBINATIONS in Restraint of Trade.—A combination of individuals to injure a third person in his trade by inducing his employes to break their contract with him and to leave his employment, is illegal, and, when it results in damage, actionable. (p. 145.)

CONTRACTS of Employment.—The Malicious Procurement of the Breach of a subsisting contract of employment, resulting in damage, is an actionable wrong. (p. 145.)

COMBINATIONS in Restraint of Trade—Injunction.—A court of equity will interpose by injunction to prevent the several members of an illegal combination to stifle business from enforcing an agreement, to the injury of one engaged in a competitive business. (p. 146.)

Smith & Wright, for the plaintiffs in error.

C. Van Epp and Kontz & Austin, for the defendants in error.

511 EVANS, J. The Doctor Blosser Company, a corporation, brought an action against a number of printing concerns using the club or trade name of the "Employing Printers Club of Atlanta," and composed of individuals, firms, and corporations engaged in the book and job-printing trade in the city of Atlanta, and whose names are set out in the record, asking an injunction and praying damages. The court granted the injunction, and exception is taken to this order. On the interlocutory hearing the defendants urged by demurrer the insufficiency of the facts pleaded to authorize the relief prayed. Notwithstanding the demurrer admitted the truth of all the facts

which were well pleaded, the plaintiff submitted proof tending to sustain all the essential allegations. .

1-3. The complaint is that the defendants formed a combination among the employing printers to control and fix the price of printing done in the city of Atlanta, and, because the plaintiff refused to affiliate with the combination, they wrongfully interfered ⁵¹² with the plaintiff's business and maliciously induced its employes to break their contracts with it and refuse to continue in its employment, to its injury and damage. A combination of individuals engaged in a particular line of business to compel one engaged in a similar business to sell his product at prices fixed by it is contrary to public policy and void; and the members of such a combination, individually and collectively, may, by appropriate injunction, be restrained from wrongfully interfering with the business of the one who is not a member of the combination. This principle is laid down in the well-considered case of *Brown & Allen v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 547, is supported both by reason and authority, and its application to the case in hand is readily apparent. The facts alleged in the petition were as follows: The plaintiff was engaged, in the city of Atlanta, in the general business of a printer for the public, enjoying a large trade, and doing a prosperous business. The defendants were also engaged in the printing business, and formed a combination or trust, called the Employing Printers Club of Atlanta, Georgia. This combination embraced nearly the entire printing and publishing fraternity of Atlanta except the newspapers, and its organization was "for the single and sole purpose of restraining trade, of absolutely defeating and destroying competition among bidders for printing of any sort to be done in the city of Atlanta, and for maintaining an arbitrary and extortionate scale of prices upon any contracts that might be received for work done in the city." This combination or club had a written constitution and by-laws, a copy of which was appended to the petition. Among the objects of the club, as recited in its constitution, was "the maintenance of legitimate prices, the suppression of undue rivalry, and mutual protection from abuses or infringement upon our rights by others." The rules provided for a fixed minimum scale of prices; that no member should give any rebate or concession to a customer; and for a uniform discount only to other members of the association. Rule 8 was: "Never give customer an itemized estimate." The scheme of the de-

endants, who confederated under the name of the Employing Printers Club, was as follows: If a customer, desiring to have printing or publishing done, made application for a bid to any one of the members constituting the club, it was the understanding and ⁵¹⁸ agreement among all of the members thereof that the printer receiving the bid for work should name the price for which he was willing to undertake it, and thereupon should list the application, the name of the customer, and the proposition for doing the work, giving a complete description of the job to a manager appointed for that very purpose, and salaried by the members of the combination; and they in turn were bound severally to each other, that if they were also invited to make competitive bids they would fix the price for such equal to or higher than that proposed by the first printer receiving the application and listing the bid. It was alleged that the combination enforced a rule among themselves, establishing a systematic way of handling the public printing for the city of Atlanta, under the operation of which each printer was to have his turn; the manager to keep track of the business and notify the different members when the city of Atlanta asked for bids, whose turn it was to do the work. They were to make the price and add ten per cent, and charge the city not only the fixed, arbitrary price, but also the additional ten per cent on the fixed price. It was alleged that a committee from the Employing Printers Club, who also represented the defendants as members of the club, waited on the plaintiff, and advised its officers that it could not continue to employ union labor in its shop, unless it became a member of the club. Plaintiff inquired of the committee the purpose and scope of the club, and was informed that it was a secret institution, and that it was necessary to become a member before its secrets could be imparted. To prevent being deprived of union labor, which was the only labor obtainable, and ignorant of the real purposes of the club, the plaintiff became a member thereof. About October 1, 1901, plaintiff made a contract with the managers of the "Wesleyan Christian Advocate" to publish that periodical, and was proceeding to execute the contract, when it was notified by the Employing Printers Club that it had violated the rules of the club in accepting such contract, and was fined four hundred and sixty-eight dollars for taking the contract. The club decided that the right to print that periodical belonged to the Foote & Davies Company, one of the defendants, and that the plaintiff should not have underbid that company. In addition

to imposing the fine, the club ruled that at the end of the year 1902 the publication price of the "Advocate" for the year 1903 should be ^{\$14} fixed by the Foote & Davies Company. The plaintiff was dissatisfied with this ruling, and resigned its membership in the club. Whereupon plaintiff was notified by a committee from the club, that unless it paid the fine and came back into the club, all union labor would be called out of its shop. The plaintiff, persisting in its refusal to resume relationship with the club, was assured by a committee from the club that it had been reorganized on a legal basis. Upon this assurance the plaintiff resumed its membership in the club, and the fine was reduced to one hundred and twenty-five dollars. The major part of this fine was paid, and plaintiff resumed its membership because of the threat to call out the union labor from its shop, and to avoid the damages incident to the loss of this class of labor. In October, 1902, the "Wesleyan Christian Advocate's" managers applied to the plaintiff to print that paper during the year 1903, stating that they were aware of the existence of the printers' combination, but before they would pay more than they were paying they would withdraw their work from Atlanta and place it elsewhere. Thereupon the plaintiff made them a bid which afforded a reasonable net profit on the proposed work. The Employing Printers Club then met and sat in judgment on the plaintiff's action in taking the contract for the second time for the publication of this periodical, and adjudged that the plaintiff pay the Foote & Davies Company three hundred dollars in cash, to partly reimburse it for the loss of the profit on the publication of the "Wesleyan Christian Advocate," and that the naming of the price for the publishing of this periodical "revert irrevocably" to the Foote & Davies Company at the expiration of the present contract. Several attempts were made to induce the plaintiff to comply with this edict, and it was threatened that if it did not comply, the club would cause all union labor to leave its employment. The plaintiff refused to comply with the club's demand, and declined to affiliate longer with the club as a member, notifying it of this resolve. Then the club caused the pressmen, feeders, printers and binders employed by the plaintiff to quit work, thereby shutting down the plaintiff's establishment, and rendering it impossible for it to conduct its business or to execute existing contracts, or to undertake further employment in the line of its trade. Actual damages were alleged

to have been sustained by the plaintiff in the sum of ten thousand dollars.

⁵¹⁵ On the interlocutory hearing it appeared that some of the employes returned to the work, and that their respective unions refused to call a strike in the plaintiff's shop. The defendants then threatened that unless the unions would call out its labor from the plaintiff's shop, they would no longer observe the union regulations. In pursuance of this threat, some of the defendants posted their respective businesses as "open shops." The plaintiff's petition was filed at this juncture of affairs.

There can be no doubt that the facts alleged in the petition, if true (and the demurrer admits their truth), establish, not only a conspiracy to fix and control the price of printing in the city of Atlanta, but also a malicious interference with the business of the plaintiff. The scope and purpose of the Employing Printers Club was to create a monopoly and stifle competition in the printing business. A mere agreement to do wrong is not actionable; but when the parties to such agreement do an overt act in furtherance of the illegal combination, resulting in injury to a third person, the conspiracy becomes actionable, and the conspirators are liable to the injured party for damages proximately flowing from their illegal conduct. It is contended by the plaintiffs in error, that, conceding that the combination among the defendants was an illegal one, the plaintiff in the court below was a party to it, and cannot be heard to complain in a court of equity. It is true that at one time the plaintiff was a member of the trust, but when the trust essayed to discipline it, it repudiated the club and informed its officers that it would no longer affiliate with the club. It was then that the club was proceeding to punish it by calling out its employes. The maxim that one must come into a court of equity with clean hands means that he must do equity as respects the defendant's rights in the particular matter of the suit: 1 Pomeroy's Equity Jurisprudence, sec. 397. "The rule that a complainant must come into equity with clean hands does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man. The dirt upon his hands must be his bad conduct in the transaction complained of. All complainants in equity are human beings, full of faults and sin, and I doubt if there is one case in ten in which the complainant is not somewhat to blame. If the complainant does equity himself, or offers to do it (except in those cases where the rule in *pari delicto*, etc., ⁵¹⁶ comes in), his hands are as clean as the court can require": Ansley

v. Wilson, 50 Ga. 421. The plaintiff is not seeking to obtain any relief by virtue of its former connection with the club, and is not therefore in *pari delicto* with the defendants, relatively to the cause of action which it brings against them. Its connection with the club ceased before filing the suit, and it has repudiated the club as an unholy alliance. Even in criminal law, the *locus penitentiae* is recognized. The aggressor may repent and abandon his felonious enterprise, and place himself in a position where he may rightfully invoke the law of self-defense in a subsequent occurrence. Besides, an unlawful combination in restraint of trade is a wrong to the public, as well as to the injured individual. If a man confederates with a burglar to break and enter a house, but abandons the criminal project, his agreement to join in the burglary will not justify an infliction of an injury upon his person by the burglar, and deprive him of his right of self-defense, merely because of the prior agreement to do a criminal act and the abandonment of his unlawful intention.

Independently of the conspiracy, the petition states a case of malicious interference with the plaintiff's contract of employment with its employes. At common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damages and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statute of laborers. The early English cases limited the action to the enticement of menial servants, but the later cases, beginning with *Lumly v. Gye*, 2 El. & B. 216, have extended the doctrine beyond menial servants; and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract. A brief reference to a few English cases will serve to present the evolution and extension of the old common-law doctrine of malicious interference with a contract. *Lumley v. Gye*, 2 El. & B. 216, was a suit for the malicious procuring of an opera singer, who had agreed with the plaintiff to perform and sing at his theater, and nowhere else, for a certain time, to break her contract and ⁵¹⁷ not perform or sing at the plaintiff's theater during the time for which she was engaged. It was there held that an action would lie for maliciously procuring a breach of contract to give exclusive personal service, provided the procurement was during the subsistence of the contract and produced

damage; and that to sustain such an action it was not necessary that the employer and employé should stand in the strict relation of master and servant. The opinion was by a divided court. The majority of the judges were inclined to the opinion that an action would lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result and did result to the plaintiff. This case was followed in *Bowen v. Hall*, 6 Q. B. Div. 333. In 1893 the same question was before the court of appeal of the queen's bench division (*Templeton v. Russell*, 1 Q. B. Div. 715), and the cases of *Lumley v. Gye*, 2 El. & B. 216, and *Bowen v. Hall*, 6 Q. B. Div. 333, were examined and approved; and these cases were said to rest upon the principle that to maliciously procure a person to break a contractual relation, which all are bound by law to respect, is actionable; and that a right of action for maliciously procuring a breach of contract is not confined to contracts of personal service. By many it was thought that the house of lords case of *Allen v. Flood*, [1898] L. R. App. Cas. 1, conflicted with the doctrine announced in *Templeton v. Russell*, 1 Q. B. Div. 715, or at least materially curtailed its scope. But in the later case of *Quinn v. Leatham*, [1901] L. R. App. Cas. 495, both cases—*Templeton v. Russell*, 1 Q. B. Div. 715, and *Allen v. Flood*, L. R. App. Cas. 1—were elaborately reviewed and analyzed; and after stating the scope and effect of the latter case, it was ruled that “a combination of two or more, without justification or excuse, to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable.” The supreme court of the United States approvingly cited the English cases of *Lumley v. Gye*, 2 El. & B. 216, and *Bowen v. Hall*, 6 Q. B. Div. 333, and reached the conclusion that if one maliciously interferes with a contract to the injury of the other, the party injured may maintain an action against the wrongdoer: *Angle v. Chicago Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. Rep. 240, 38 L. ed. 55. Though this rule is not universal in the courts of last resort of our sister states, it is believed to have been followed ⁵¹⁸ in most of them. In the carefully prepared opinion in *Walker v. Cronin*, 107 Mass. 555, the court decided that a manufacturer is entitled to maintain an action against a third person, who with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employés to leave his employment, whereby the manufacturer

lost their services, and the profits and advantages which he would have derived therefrom: See, also, *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125, 52 L. R. A. 115. And the supreme court of North Carolina held in two cases (*Hawkins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanley*, 76 N. C. 355), that if a person maliciously entices laborers or croppers to break their contract with their employer and desert his service, the employer may recover damages against such person.

In this state it has been held that when one man employs a laborer to work on his farm, and another man, knowing of such contract of employment, entices, hires or persuades the laborer to leave the service of the first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages: *Salter v. Howard*, 43 Ga. 601. From the reasoning of McCay, J., in *Barron v. Collins*, 49 Ga. 580, it would appear that he was inclined to the opinion that an action for the malicious breach of contract was limited to cases of servants. The declaration in that case alleged that A, having contracted with one Charles Barron, that he, the said Charles, should furnish himself and his two daughters and one George Barron, to work as laborers on the plaintiff's land for the year 1872, the plaintiff to furnish the land and mules, and the said Charles to receive one-third and the plaintiff two-thirds of the crop; and that the defendant, knowing that the said contract had not been abandoned, but still existed, employed the said Charles, his two daughters, and the said George, to work for him for the year 1872. It was held, on demurrer, that no good cause of action was set forth. In the opinion it was said that the gist of the action was enticing away plaintiff's servants; and that the contract between the plaintiff and Charles Barron did not create the relation of master and servant, but that Charles Barron was a contractor and not a servant. However, within the limits of a very brief opinion, it was pointed out that the declaration was defective in many other particulars. It was defective in not setting forth the nature of the damages. It was said also that perhaps the contract, resting in parol, was not binding, as it was not to be performed within a year. Nor did it appear that Charles Barron was authorized to contract for the service of the others. Inasmuch as the petition was defective in other vital particulars, the judgment of the court was not confined to the question of the malicious procurement of the breach of the contract. Attention is also called to the fact that this case was de-

cided in 1873, when the principle under discussion was in its evolutionary stage. Speaking for myself, I believe the same reasons which support the principle that an action will lie for the malicious procurement of a breach of contract of personal service will cover every case where one person maliciously persuades and induces another to break any legal contract. In the case at bar the relation of master and servant did exist between the plaintiff and his employes, and even applying the common-law rule of liability, the defendants would be answerable in damages to the plaintiff for a malicious procurement of the breach of contract by its employes. The term "malicious," used in this connection, is to be given a liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Ineffective persuasion to induce another to violate his contract would not, of itself, be actionable, but if the persuasion be used for the purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff, with a knowledge of the subsistence of the contract, it becomes a malicious act, and if injury ensues from it a cause of action accrues to the injured party: *Bowen v. Hall*, 6 Q. B. Div. 333. As was said by Compton, J., in *Lumley v. Gye*, 2 El. & B. 216, "it must now be considered as clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, . . . is responsible at law": See *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797.

4. From the proof submitted it appeared that means other than persuasion were employed by the defendants to induce the plaintiff's employes to quit work. They threatened the various labor unions that unless the union labor of the plaintiff was called out, ⁵²⁰ they would no longer exclusively employ union men, but would run what is known as an "open shop." This threat was being carried into execution, when the plaintiff applied for the writ of injunction. The plan of attack on the plaintiff was to force the various labor unions to call out their members from the plaintiff's shop, under the threat that, upon their refusal to do so, the defendants would run their respective businesses under what is known as an open shop, that is, they would employ their labor without reference to their connection

with the various unions. The several defendants had the undoubted right to employ any character of labor they might prefer. If they desired to supplant the union labor and substitute therefor nonunion labor, such action would be strictly within their legal right. But the record shows that practically all the skilled labor in this branch of business in the city of Atlanta belonged to the various labor unions, which had an agreement with the defendants that the defendants would hire only union employes, and that the unions would not permit their members to work for any employer who was not a party to the agreement. This agreement was incidental to the main purpose of the organization. It was a part of the plan to force all employing printers to become members of the Employing Printers Club. The defendants were insisting on the observance of this agreement by the labor unions, and upon their refusal to live up to the agreement they were threatened with the bete noire of unionism, the open shop. An injunction may be granted against the enforcement of an illegal agreement of dealers to injure the business of another person: *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588. A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the hurt and injury of one engaged in a competitive business: *Brown & Allen v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 41 S. E. 553, 57 L. R. A. 547.

Under the facts in the record the court properly enjoined the defendants from interfering with the plaintiff's business as a printer engaged in competitive trade, and from unlawfully influencing the labor organization from obstructing its business.

Judgment affirmed.

All the justices concur.

Unlawful Trusts and Combinations are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273.

Boycotting is discussed at length in the recent note to *Gray v. Building Trades' Council*, 103 Am. St. Rep. 488-508.

The Liability for Inducing Persons to Break Their Contracts is discussed in the monographic notes to *Raymond v. Yarrington*, 97 Am. St. Rep. 923-928; *Webber v. Barry*, 11 Am. St. Rep. 474-478.

CITY COUNCIL OF AUGUSTA v. REYNOLDS.

[122 Ga. 754, 50 S. E. 998.]

NUISANCE, PUBLIC—Obstruction of Street.—Any temporary obstruction in a public street is presumptively a public nuisance, and it is incumbent upon the person responsible for the presence of such obstruction to show that it was placed in the street in furtherance of a lawful and legitimate purpose, and has not been continued for a longer time than was reasonably necessary. (p. 149.)

MUNICIPAL CORPORATIONS—Power to Permit Obstruction of Street.—Power over public streets given to municipal corporations under the ordinary grants in municipal charters does not authorize the municipal authorities, even by express ordinance, to permit the erection in streets of temporary obstructions for purely private gain. (pp. 149, 150.)

NUISANCE, PUBLIC—Street Fair.—The use of a large portion of a business street by private individuals for their own pecuniary benefit, for the purposes of a street fair, consisting of numerous tents, including shows and exhibitions, together with various stands, booths and structures for the amusement of the public and the private gain of the owners, and by which the public is deprived for several days of the right to use that portion of the street for traffic or travel, is an aggravated public nuisance, which cannot be authorized by the city authorities, and which may be enjoined. (p. 150.)

NUISANCE, PUBLIC—Obstruction of Street—Injunction.—A court of equity has jurisdiction, upon the proper information filed, to restrain the erection or continuance of a public nuisance in a public street. (p. 151.)

Information filed on behalf of the state by the solicitor general upon the petition of certain named persons complaining of the city council of the city of Augusta, and one J. D. Twiggs, in that said city council had granted to said Twiggs permission to hold a street fair to continue one week and to occupy a portion of one of the principal business streets of Augusta. The prayer of the petition was for an injunction restraining the holding of such fair, and the petition alleged that: "The fair will consist of tents, inclosing shows and exhibitions, structures, stands, Ferris wheels, merry-go-rounds, 'shoot the chutes,' the 'loops,' and various devices and constructions and obstructions, and will monopolize the portion of the street in which it is placed. These obstructions will seriously interfere with the use of the street by the public for traffic, travel and business, and will occasion great hurt and annoyance to the citizens in general. The carnival will consist of a large number of separate shows and exhibitions, each in a separate tent or inclosure, besides numerous stands or booths for the sale of articles of merchandise.

Criers or 'spielers' will be stationed in front of each tent, show, stand, or booth, who, by the use of horns, megaphones, bells, drums, and similar instruments, will attempt to attract crowds of people in the street to each place. Admission will be charged by the proprietors to these shows and exhibitions"; and that such fair will obstruct the street for public travel and will constitute a public nuisance. An interlocutory injunction was granted, and the defendants excepted.

C. H. Cohen, A. Branch and G. T. Jackson, for the plaintiffs in error.

J. S. Reynolds, solicitor general, E. H. Callaway and W. K. Miller, for the defendants in error.

⁷⁵⁶ COBB, J. 1. Streets are primarily intended for the use of travelers; and a municipal corporation has no power, in the absence of express legislative authority, to allow a street to be used for any other purpose: Pol. Code, sec. 745. Any permanent structure in a street which materially interferes with travel thereon is a public nuisance. Permanent structures which do not interfere with travel and which are erected for public purposes, such as telegraph and telephone poles, and the like, are permissible. But no permanent structure of any character which interferes in the slightest degree with the right of travel upon the street is ever permissible where such structure is erected for purely private purposes. Temporary obstructions in a street are permissible under certain circumstances, even where the obstruction is for the benefit or convenience of an individual. A merchant may temporarily obstruct passage along a street either in receiving goods from a carrier on the street or delivering goods to such carrier. A householder may temporarily obstruct a street in moving his effects ⁷⁵⁷ out of or into his house. It is impossible to enumerate all the cases in which the temporary obstruction of a street may be allowed; but the general rule is that if the purpose for which the obstruction is created is lawful, and the obstruction exists only for such a time as is reasonably necessary to accomplish the purpose which brings about the necessity for the obstruction, such an obstruction would not be a public nuisance. What would be a reasonable time is to be determined according to the circumstances of each case. If the obstruction continues for a time that is not reasonably necessary for the accomplishment of the purpose, then it becomes a public nuisance. What would be an unreasonable time in cases where

goods are being received into or delivered from a place of business, or where household effects are being carried into or out of a place of residence, might not be an unreasonable time where the obstruction is made necessary on account of buildings being erected upon property abutting the street. In all cases the obstructions to public travel should be removed as soon as the reason for the obstruction has ceased. To continue to obstruct a public street with those things necessary in case of the erection of a building upon abutting property, after the building has reached a stage where such obstructions are no longer necessary in carrying on the work, would render the person so continuing the obstruction liable as the maintainer of a public nuisance. Any temporary obstruction in a public street is presumptively a public nuisance, and it is incumbent upon the persons responsible for the presence of such obstruction to show that it was placed in the street in furtherance of a lawful and legitimate purpose, and has not been continued any longer than was reasonably necessary for the accomplishment of this purpose. Persons who have places of business or residences upon lots abutting upon the street may temporarily obstruct the street under those circumstances where it is necessary to completely enjoy the rights and privileges incident to ownership of property so situated. Persons who own vacant lots abutting upon a street may temporarily obstruct the streets whenever necessary to improve such property by the erection of buildings thereon, but no such necessity can ever exist when upon the property to be improved there is ample room for the deposit of all material to be used in the building and carrying on of all work essential to its construction. ⁷⁵⁸ The question to be determined in the present case is whether a street fair of the character described in the petition would be such an obstruction of a public street as would make it a public nuisance. It would not be a permanent obstruction, for it is only to continue one week. Being a temporary obstruction only, it is to be determined whether it results from a lawful purpose. The obstruction is purely for private gain. The fact that the promoter of the enterprise is a military company which is a part of the state militia does not make it one inaugurated for a public purpose. It is to occupy not more than one-half of the street. But the public is entitled to the whole of every street, as against anyone who places obstructions therein for other than a lawful purpose: *Commonwealth v. Ruggles*, 6 Allen, 588; 1 Wood on Nuisances, 3d ed., sec. 250. The power over streets, given to municipal corporations under the ordinary grants in

municipal charters, does not authorize the municipal authorities, even by express ordinance, to permit the erection in streets of temporary obstructions for purely private gain. The enterprise described in the petition is not in any sense a public enterprise. It is merely a scheme of private individuals for pecuniary gain, and the use of the street, either in whole or in part, has not as a basis any purpose which the law would recognize as lawful, in the absence of express legislative authority permitting it. In other words, the enterprise sought to be carried on in the street would, if permitted, be nothing more or less than a public nuisance, and a public nuisance of a most aggravating character: See *Rex v. Carlile*, 6 Car. & P. 636; *State v. Laverack*, 34 N. J. L. 204; 15 Am. & Eng. Ency. of Law, 2d ed., 499, 500; Elliott on Roads and Streets, 2d ed., sec. 648. In some old English cases it was held that a fair in a highway was permissible, but an examination of those cases will show that the ruling in each was based upon the existence of an immemorial custom: See *Elwood v. Bullock*, 15 L. J., N. S., 330; *King v. Smith*, 4 Esp. 109. Besides, the old English fairs were very different enterprises from the one described in the present petition.

2. It is therefore to be determined whether there is any authority in the charter of the city of Augusta for permitting a portion of one of its streets to be used for the purpose of a street fair of the character described in the petition. The charter of ⁷⁵⁰ Augusta contains the ordinary grants in reference to the laying out and control of streets: Blome's Code of Augusta, 308, 455. These powers do not authorize such a use of the street, and it was not seriously contended in the argument that they did. It is, however, strenuously insisted that under the act of 1898 (Acts 1898, p. 131), amending the charter of Augusta, the municipal authorities have power to permit such a use of the streets. Taken as a whole, the act seems to be limited to a delegation of power to deal with the streets for railroad and depot purposes. But there is some very broad language in the act, and for the purposes of this case it will be treated as conferring the broader power to deal with the streets for any purpose. The act declares: "When, in the opinion of the city council of Augusta, the whole or any part of a street has ceased to be of general utility or use as a street, the city council, in its discretion, may permit platforms, gangways, tracks, or other structures to be constructed upon such level, and with such width, height, length, and of such material as it may prescribe and approve, and on such terms and conditions as it may designate; or the

city council of Augusta, in its discretion, may declare the same vacant and abandoned as a street, and donate the same to a use which, in their opinion, will be of advantage or utility to the commercial or business interests of the city, on such terms as the city council may prescribe." It is claimed that this confers upon the city authorities the power to vacate a street and use the land for any purpose that may be beneficial to the commercial interests of the city. Let this be conceded. The further contention is made that the power to vacate altogether and for all time carries with it the power to vacate in part and for a limited time. But the exercise of this power is dependent upon the city council having reached the conclusion that the street is no longer of public utility; and before the power to vacate can be exercised it must appear that it is the opinion of the council that the street is no longer of public utility. It not only does not appear that it is the opinion of the city council that the portion of Broad street where permission was granted to hold the street fair has ceased to be of public utility, but it appears from the petition that Broad street is the principal and most important business street in the city, and the use of the street for the fair was limited to one week. The present record ⁷⁰⁰ does not present any such case as is contemplated by the act of 1898, even under the liberal construction contended for. The council has not exercised any authority based upon an opinion that the portion of Broad street in question has ceased to be of public utility, or will not be of public utility during the week the fair is to be held; but it has simply authorized private individuals, for their own pecuniary benefit, to use a large portion of an important business street, and thereby deprive the public, for several days, of the right to use that portion of the street for traffic or travel. There is absolutely nothing in the act of 1898, or in any other provision of the charter of Augusta, which can be properly construed as authority for the city authorities to permit such a use of one of its streets.

3. The jurisdiction of courts of equity, on the information of the proper public officer in behalf of the public, to restrain the erection or continuance of a public nuisance is well settled: *Mayor and Council of Columbus v. Jaques*, 30 Ga. 506; *Lofton v. Collins*, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150.

Judgment affirmed.

All the justices concur, except Candler, J., absent.

Streets in Their Entirety are public properties, exclusively for public use, and no part of them can be devoted exclusively to private purposes by virtue of municipal ordinances or otherwise: *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304. An obstruction of a street which interferes with its use by the public generally constitutes a nuisance: *Callanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831; *Cohen v. New York*, 113 N. Y. 532, 10 Am. St. Rep. 506; *Savage v. Salem*, 23 Or. 381, 37 Am. St. Rep. 688. As to how far an abutting owner may use a highway for private purposes, see the note to *Wright v. Austin*, 101 Am. St. Rep. 107; and the recent cases of *Brauer v. Baltimore etc. Heating Co.*, 99 Md. 367, 105 Am. St. Rep. 304; *Tilly v. Mitchell etc. Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

RAISOR v. CHICAGO AND ALTON RAILWAY COMPANY.

[215 Ill. 47, 74 N. E. 69.]

CONFLICT OF LAWS—Penal Statutes.—A statute of another state, penal in its character, has no extraterritorial force and will not be enforced in another state whose public policy is opposed to it. (p. 154.)

CONFLICT OF LAWS—Penal Statutes—Damages for Causing Death.—A statute of another state permitting the recovery of a fixed sum for the negligent killing of a person without proof that plaintiff has sustained any damage, is penal in its character, and if opposed to the public policy of another state will not be enforced therein. (p. 157.)

PUBLIC POLICY.—In Order to Ascertain the public policy of a state in respect to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create a public policy. (p. 158.)

Darrow, Masters & Wilson, for the plaintiff in error.

Winston, Payne & Strawn, F. S. Winston and R. M. Shaw, for the defendant in error.

50 MAGRUDER, J. The following opinion delivered by the appellate court for the first district, speaking through Mr. Justice Adams, correctly disposes of the questions involved in this case, and is adopted as the opinion of this court:

“Under the declaration plaintiff can only recover, if at all, under section 2864, and the arguments of counsel for the parties, respectively, are on this hypothesis. The questions argued are, whether section 2864 is penal, and whether the enforcement of the section would be contrary to the policy of this state, appellee

urging the affirmative and appellant the negative of both questions. If the section is penal in its character it cannot be enforced in this state: Story on ⁵¹ Conflict of Laws, sec. 620 et seq.; *Shedd v. Moran*, 10 Ill. App. 618, 623; *Sherman v. Gassett*, 4 Gilm. 521, 523. In the last case the court say: 'It is a well-settled rule of jurisprudence that the courts of one country will not enforce either the criminal or penal laws of another.'

"The language of the statute (section 2864) is, 'shall forfeit and pay for any person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered,' etc. The plaintiff is not required to prove any damage, but only that the death was occasioned by such defect, negligence or criminal intent as is mentioned in the section and averred in the declaration. The declaration in this case is framed on this theory, except the fifth count, in which it is averred that the plaintiff was dependent for support on the deceased, and by his death has been deprived of her means of support. Each count except the sixth contains this averment: 'That by reason of the premises and said sections, the defendant has become liable to pay plaintiff the sum of five thousand dollars.' The sixth count has the same averment, with the exception that the word 'section' instead of 'sections' is used.

"As the statute is administered in Missouri no proof of damage is required. In *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164, the suit was brought by the parents of a minor son, between nineteen and twenty years of age at the time of his death. It was objected that the father had emancipated the deceased and therefore was not entitled to his earnings, and that the statute was compensatory, and there could be no recovery. The court acceded to the proposition that if the deceased had been emancipated the father had no right to his earnings, but said: 'Whether the amount awarded is denominated damages, compensatory damages, liquidated, as was said in *Coover v. Moore*, 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can, without objections, serve both purposes at one and the same time.' Thus the court, by the nature of the defense, namely, that ⁵² no pecuniary loss had been suffered by the plaintiff by their son's death, was forced, in order to sustain the action, to hold that the statute was penal. In *Rafferty v. Missouri Pac. Ry. Co.*, 15 Mo. App. 559, which was a suit by parents, under the same section of the statute, to recover for the death of a minor child, the jury, contrary to the instructions of the court, returned a verdict

for two thousand five hundred dollars, which the court, on motion for a new trial by the defendant, set aside, saying of the statute: 'It is penal in its nature, and it is right that the carriers and corporations named in it, and against whom a heavy penalty is assessed, which goes to the surviving relatives, in each case of a death caused by the negligence of their servants, should have whatever benefit they may derive under the statute from the size and fixity of the sum named as damages.' Thus the Missouri courts have construed the section as penal.

"By the terms of the statute, and as it is administered in Missouri, whether the plaintiff has or not suffered pecuniary loss or damage is immaterial. His right to recover depends solely on the plaintiff's relation to the deceased and the culpability of the defendant, within the meaning of the statute and as averred in the declaration. From this it necessarily follows that a plaintiff who has suffered no damage, but has even been relieved, by the death, of a pecuniary burden, may recover five thousand dollars. If, in any case, any part of the amount recovered may be deemed compensatory, this is merely incidental, the primary object of the statute being punitive. The amount recoverable is fixed at five thousand dollars. No more and no less is recoverable (*Rafferty v. Missouri Pac. Ry. Co.*, 15 Mo. App. 559), and this, even though the plaintiff has suffered no damage.

"*Marshall v. Wabash R. R. Co.*, 46 Fed. 269, decided in 1891, was a suit in the United States circuit court based on the statute in question. *Coover v. Moore*, 31 Mo. 574, and *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164, were cited in support of the proposition that the statute was not ⁵³ penal, in respect to which the court said: 'Now, it is insisted that these decisions settle the proposition that the statute under consideration is not a penal statute and that this court is bound by those decisions. I do not concur with either proposition. It is true that the court, in *Coover v. Moore*, 31 Mo. 574, say that the damages are compensatory. So they may be in certain cases, and in some cases less than full compensation. But where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal.' The court held as follows: 'I therefore hold that this court has no jurisdiction in this case, upon the well-recognized rule that

penal statutes can be enforced only within the sovereignty of their creation, much for the same reason that criminal statutes have no extraterritorial force.'

'In *Matheson v. Kansas City etc. R. R. Co.*, 61 Kan. 667, 60 Pac. 747, the court refused to enforce the Missouri statute because of its penal character, saying, among other things: 'An arbitrary award of a fixed amount of damages, regardless of pecuniary loss sustained, is antagonistic to our policy and is palpably inconsistent with our statute authorizing a recovery in such cases. Here the plaintiff must show a pecuniary loss, and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin no more than nominal damages can be recovered. There have been a number of such cases, an illustration of which may be found in *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543, 6 Pac. 877, where the jury specially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary forfeiture of five thousand dollars in such a case, arising under the Missouri statute, would be purely punitive, and the ⁵⁴ fact that the penalty was bestowed on relatives of deceased would not take away the penal character of the award.'

"A statute of the state of Massachusetts provided as follows: 'If, by reason of negligence or carelessness of a corporation operating a railroad or street railway or the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than five hundred dollars or more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, or if there are no children, to the use of the widow, or if no widow to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to a law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or its servants or agents, and to be re-

covered in an action of tort commenced within one year from the injury causing the death, by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment.' The administrator of one L. C. Adams, deceased, brought suit under the last sentence of the section quoted supra, in the state of Vermont: *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76. The court held that the statute was penal, and, therefore, not enforceable in Vermont. The reasoning of the court is, in substance, that the true test whether a statute is penal is, whether the main purpose of the statute is the giving of compensation for an injury sustained or the infliction of a punishment on a wrongdoer, and held that applying this test, ⁵⁵ the statute was penal, saying, among other things: 'It appears, then, that whatever the damages may be or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained. . . . All these matters which enter into the question of compensation are excluded from the inquiry. The wrongdoer is to be punished whether the person receiving the amount of the recovery has sustained a substantial injury or not. If the beneficiary has, in fact, received an injury, it is in no way made the basis of the recovery.' This reasoning is equally applicable to the statute in question, and is, as we think, unanswerable. The proof required in the present case is substantially the same as would be required in support of an indictment against the corporation for the alleged negligence.

"In *O'Reilly v. North Eastern R. R. Co.*, 16 R. I. 388, 394, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719, the court held the Massachusetts statute penal and refused to enforce it, saying: 'That the liability imposed by the Massachusetts statute is penal is very clear. The damages, as we construe the provision, are directed "to be assessed with reference to the degree of culpability of the corporation, or of its servants or agents," and to the amount of at least five hundred dollars. These directions clearly show a punitive purpose.'

"The supreme court of Kansas, in *Dale v. Atchison etc. R. R. Co.*, 57 Kan. 601, 47 Pac. 521, held a statute of New Mexico, substantially the same as the Missouri statute, penal, and therefore not enforceable in Kansas.

"Appellant's counsel rely on *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123, and quote the following from the opinion in that case: 'The rule that courts of no country execute the penal laws of another applies not only

to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes.' Minor, in his work on Conflict of Laws (page 22, note 3), criticises much that is said in the opinion, and on page 24 says: 'So far as private international law is concerned it matters not whether that punishment is ⁵⁶ inflicted through the instrumentality of an ordinary prosecution by the state's officers for a fine, or through the medium of a civil action by the party injured for penal damages. In substance it is an act of punishment. It is punitive in either case.' Such seems to be the view of the court in *Missouri River Tel. Co. v. National Bank*, 74 Ill. 218. In that case the plaintiff declared specially that the defendant, in violation of an act of Congress, received from it, at divers times, interest amounting to five hundred dollars above the rate allowed by the law of Iowa, in violation of an act of Congress, whereby the defendant became liable, under said act, to pay the plaintiff double that sum, namely one thousand dollars. The transactions involved occurred in Iowa. The court held that the statute was penal; that by the act of Congress jurisdiction was not conferred on this state, and say: 'And it is equally true that both the governments of the United States and Iowa are wholly independent of this state. They, severally, have all the attributes of sovereignty essential to the enactment and enforcement of laws for the government of their citizens within the limits of their constitutions; and in accordance with long-settled rules of law this state cannot enforce their criminal or penal laws': See, also, *Sherman v. Gassett*, 4 Gilm. 521, 523.

· "Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect to any matter the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained: *Carroll v. City of East St. Louis*, 67 Ill. 568, 571, 16 Am. Rep. 632.

"In 1845 the legislature adopted as the law of this state 'the common law of England and all statutes or acts of the British parliament made in aid thereof, and to supply the defects of the common law prior to the fourth year of James I': Rev. Stats. 1845, c. 62, sec. 1. This includes the common-law forms of actions *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto*, or in ⁵⁷ any action sounding in damages, cannot recover substantial damages without proof

that he has suffered such. Two elements must concur to entitle a plaintiff to recover substantial damages, injury and actual damages, and these two must be proved. On proof of injury alone, nominal damages may be recovered, as the law presumes some damages on proof of injury; but there can be no recovery of actual or substantial damage in the absence of proof thereof.

"But the legislature has expressed itself with regard to the very subject matter of the present suit, namely, the death of a person 'caused by wrongful act, neglect or default.' In such case an action may be brought in the name of the personal representative of the deceased, for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding ten thousand dollars': Hurd's Rev. Stats. 1903, p. 1043. Our statute is, substantially, a copy of the first two sections of 9 and 10 Victoria, chapter 93, and of the New York statute on the same subject, and it has been held in England, New York and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages, and that when there has been no pecuniary loss there can be no recovery: *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400. It is therefore, as we think, contrary to the policy of this state, as evidenced by the acts of the legislature, to permit a recovery for damages on mere proof of neglect or default of the defendant, and without proof that the plaintiff has suffered any pecuniary loss.

"The judgment will be affirmed."

Accordingly, the judgment of the appellate court, affirming the judgment of the circuit court of Cook county, is affirmed.

The Question of Conflict of Laws in actions for wrongful death is discussed in the monographic notes to *Attrill v. Huntington*, 14 Am. St. Rep. 353-355; *Gray v. Telegraph Co.*, 91 Am. St. Rep. 726, 727; and the cases of *Wabash R. R. Co. v. Fox*, 64 Ohio St. 133, 83 Am. St. Rep. 739; *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553. In a recent Iowa case it is stated that a statute giving a remedy for an injury causing death is not penal in its nature, and therefore limited, as to the remedy it affords, to the state of its enactment: *Romano v. Capital City Brick etc. Co.*, 125 Iowa, 591, post p. 323. See, too, *Dennis v. Atlantic etc. Ry.*, 70 S. C. 254, post, p. 746.

That a Penal Law of One State will not support a civil action in another, see *Adams v. Fitchburg R. R. Co.*, 67 Vt. 76, 48 Am. St. Rep. 800.

STEELE v. FRATERNAL TRIBUNES.

[215 Ill. 190, 74 N. E. 121.]

BENEFIT SOCIETIES—Insurance.—False Statement of his age made by an applicant for membership in a benefit insurance society is a fraud upon it, and vitiates the contract of insurance. (p. 161.)

CORPORATIONS.—Contracts Ultra Vires made with or by a corporation are wholly void and of no legal effect, and cannot be ratified. (p. 161.)

BENEFIT SOCIETIES—Insurance—False Statements.—If the by-laws of a benefit insurance company prohibit it from receiving a member above a certain age, the society is not bound by a certificate of insurance issued to a member over that age, whose application contained a false statement as to his age. (p. 161.)

CORPORATIONS—Estoppel.—If a corporation acts within the general scope of the powers conferred upon it by the legislature, it, as well as all persons contracting with it, will be estopped to deny that it has complied with the legal formalities requisite to its existence or to its action. (p. 161.)

CORPORATIONS—Contracts Ultra Vires—Estoppel.—If a contract made by a corporation is beyond the powers conferred upon it by existing laws, neither the corporation nor a party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by these laws. (p. 161.)

CORPORATIONS—Notice of Powers.—A person dealing with a corporation having limited and delegated powers, is chargeable with notice of those powers and their limitations, and cannot plead his ignorance of their existence. (p. 162.)

G. F. Comstock and H. D. Wilcox, for the plaintiffs in error.

J. McCartney, for the defendant in error.

193 WILKIN, J. It is insisted as grounds of reversal that the finding of facts made by the appellate court is not sufficient, and that the court erred in sustaining defendant's plea of ultra vires.

The defendant in error was organized under the statute of this state which provides that the incorporation of such companies shall be under the supervision of the superintendent of insurance, and when they have complied with the statute he shall issue to them a certificate of organization, and thereupon they may proceed to transact business according to the plan of their organization. It was evidently the intention of the legislature to control all fraternal societies and place them under the direction of the insurance department. The defendant society, in its certificate of organization, provided that it would

insure persons between the ages of eighteen and fifty-one years. This was the limit placed upon its operations, and it was not authorized to carry on business outside of those limits. At the time the insured made application for membership he falsely stated that he was fifty-one years of age, and gave the date of his birth as 1847, when, in fact, he was born in 1839. He agreed, in his application, to warrant the faithfulness of the statements therein contained, and agreed that any untrue or fraudulent statement made therein, or to the medical examiner, or concealment of facts made by him in his application, should forfeit his right of insurance. These facts were found by the appellate court, and are sufficient, in law, to sustain its judgment. The false statement of the age of the assured was a fraud upon the defendant in error and vitiated the contract of insurance.

It is insisted, however, that even though the contract be regarded as ultra vires, yet defendant in error cannot avail itself of such defense, the contract having been performed in good faith by the other party and the corporation had the full benefit of such performance. We cannot agree with this contention. A contract of a corporation which is ultra ¹⁹⁴ vires in the proper sense of that term—that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature—is not only voidable, but wholly void and of no legal effect. The objection to the contract here is, not merely that the corporation ought not to have made it, but that it could not lawfully make it. The contract could not be ratified by either party because it could not have been authorized by either. No performance by the parties could give the unlawful contract validity or become the foundation of any right of action upon it. When a corporation acts within the general scope of the powers conferred upon it by the legislature, it, as well as all persons contracting with it, will be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action because such prerequisites might, in fact, have been complied with: *Wood v. Mystic Circle*, 212 Ill. 532, 72 N. E. 783. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws. The powers delegated by the state to corporations are matters of public law, of which no one can

plead ignorance. A party dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations and cannot plead his ignorance of their existence: *National Home Bldg. Assn. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245, 54 N. E. 619, 64 L. R. A. 399; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478, 35 L. ed. 55. Here the company was absolutely powerless to insure a man over fifty-one years of age.

We find no reversible error, and the judgment of the appellate court will be affirmed.

A Person Dealing with a Corporation having limited and delegated powers conferred by law seems to be chargeable with notice of them and their scope, and cannot plead ignorance in avoidance of the defense of ultra vires: *National Home etc. Assn. v. Home Sav. Bank*, 181 Ill. 35, 72 Am. St. Rep. 245; *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 70 Am. St. Rep. 334. See, too, the monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 176.

The Doctrine of Ultra Vires as applied to contracts of private corporations is the subject of a monographic note to *In re Assignment Mut. etc. Ins. Co.*, 70 Am. St. Rep. 156-180. If a corporation has entered into a contract not immoral in itself and not forbidden by any statute, which has been in good faith performed by the other party, the corporation cannot be heard on a plea of ultra vires: *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, and see the cases cited in the cross-reference note thereto.

CANTON UNION COAL COMPANY v. PARLIN & ORENDORFF COMPANY.

[215 Ill. 244, 74 N. E. 143.]

ACCORD AND SATISFACTION.—Payment of Part Actually Due or of a less sum than is claimed on a disputed claim, if given and received in satisfaction of the demand, constitutes an accord and satisfaction. (p. 165.)

ACCORD AND SATISFACTION—Acceptance of Check.—If a check is offered in full satisfaction of a disputed demand, and in such manner or accompanied by such acts or declarations as amount to a condition that if the person to whom it is offered takes it, he does so in satisfaction of his demand, his acceptance of the check will constitute an accord and satisfaction of the demand, although he protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. (p. 166.)

ACCORD AND SATISFACTION — Waiver — Acceptance of Check.—If when a debtor makes an offer of a check in full satisfaction of his creditor's demand, the fact that he makes no formal objection to the statement of the creditor that there is still a balance due him, beyond stating that he does not owe more than the amount of the check, does not constitute a waiver of the condition of his offer that the acceptance of the check shall constitute full satisfaction of the demand. (pp. 166, 167.)

Chiperfield & Chiperfield, for the appellant.

L. Gray, for the appellee.

²⁴⁴ CARTWRIGHT, J. Appellant, a partnership, brought this suit in the circuit court of Fulton county in assumpsit against appellee, a corporation, and the declaration consisted of the common counts. Upon a trial plaintiff's claim was for coal sold and delivered ²⁴⁵ under a written contract dated July 3, 1902, by which plaintiff agreed to furnish to the defendant its requirements of coal (except sixty thousand bushels to be purchased elsewhere) up to July 1, 1903, at certain prices stated in the contract. The defense made was under a plea of accord and satisfaction, which alleged that the defendant delivered to plaintiff, and plaintiff accepted of it, the defendant's check on the First National Bank of Canton in the sum of \$470.67, in full satisfaction and discharge of the several promises and sums of money mentioned in the declaration. At the close of the evidence the court directed the jury to find for the defendant, and a verdict was returned accordingly, upon which judgment was entered. Upon appeal to the appellate court for the third district the judgment was affirmed, and a further appeal was prosecuted to this court.

The facts were not in dispute, and the only question was what inferences might justifiably be drawn therefrom. If the facts necessarily led to the conclusion that there had been an accord and satisfaction there was no error in directing a verdict for the defendant, but if different conclusions as to the ultimate fact might reasonably be drawn from the facts proved, the issue should have been submitted to the jury. Plaintiff was bound by the contract to furnish defendant's requirements of coal from July 3, 1902, to July 1, 1903, with the exception above stated, and more than ten thousand tons were furnished under the contract. At various times during the period covered by the contract the defendant complained that plaintiff was not furnishing sufficient coal to meet defendant's requirements and notified plaintiff that it had been compelled to go

into the open market and buy coal at higher prices, and would hold plaintiff responsible for the losses occasioned by its default. At different times plaintiff was requested to deliver larger quantities of coal, and on January 8, 1903, defendant wrote to plaintiff that it had repeatedly written and advised that its requirements were greater than the amount being furnished; that plaintiff had replied that ²⁴⁶ it would furnish only one car per day; that defendant expected plaintiff to comply with the contract, and that the failure to do so had caused defendant to pay prices in advance of the contract price. The letter requested a delivery of two cars of coal per day, and stated that defendant would hold plaintiff responsible for loss and damage by way of cost and expense occasioned by the alleged default. Some coal was furnished after July 1, 1903, and on July 25th, the defendant sent to the plaintiff a statement of the account according to defendant's claim, with what was called a credit memorandum for coal received in July, 1903, and a debit memorandum of coal claimed to have been purchased in the open market at market prices above the contract prices, amounting to \$1,350, which sum was charged to the plaintiff. The statement and accompanying memoranda showed a balance of \$470.67 due to plaintiff, for which a check on the First National Bank of Canton, Illinois, was inclosed, pinned to the following letter:

"Canton, Ill., July 25, 1903.

"Canton Union Coal Co., Town.

"Gentlemen: Inclosed please find our check on the First National Bank of Canton, No. 19,348, \$470.67, in full of account, together with our statement attached. We also inclose debit memorandum for the difference between contract price and what we were obliged to pay in open market for coal purchased during the period of the contract with you, on account of your failure to supply our requirements according to such contract. You will also find inclosed credit memorandum for coal received during July for which you have furnished no invoice. Please acknowledge receipt and oblige.

"Yours truly,

"PARLIN & ORENDORFF CO.,

"By I. H. GILLET, Asst. Treas."

The check, with the letter and inclosures, was received by Joseph Simmons, the bookkeeper for plaintiff. He put the check in plaintiff's safe and made out a statement to the de-

defendant of its account as shown by the plaintiff's books. Upon that account he credited the check, which left a balance due, according to the statement, of \$1470.09. The balance claimed on the trial was \$1460.48. Simmons took the statement to defendant's office and there met U. G. Orendorff, ²⁴⁷ its secretary and treasurer. Simmons said that he had brought a statement of balance due, to which Orendorff replied that he did not owe plaintiff anything. Simmons said that he did, and laid the statement down before him, and said: "Here is the balance due July 1st, and the cars and amount shipped in July, and figured at a different price than you have, which amounts to so much, and I have given you credit on account for the check received to-day for \$470.67; still leaving a balance due." Handing the statement to Orendorff he further said, "Mail us a check for that." Orendorff again said that he did not owe plaintiff anything, and Simmons said, "You just keep that—it might come handy," and Orendorff replied, "I will file it," and Simmons went away leaving the statement there. Plaintiff put the check in the bank the same day and collected it.

The amount due from the defendant to the plaintiff was unliquidated and in dispute between the parties. The defendant claimed that the plaintiff had not performed its contract to furnish defendant's requirements of coal, and that it had been compelled to go into the open market and buy coal at higher prices. The plaintiff was insisting upon payment at the contract price for whatever coal had been furnished under it. In such a case, payment of a part actually due or of a less sum than was claimed by plaintiff, if given and received in satisfaction of the demand, would amount to accord and satisfaction. The question whether the amount accepted was less than the plaintiff was entitled to receive or would have recovered in case of suit is immaterial and does not in any way affect the rule. To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand. If the offer is made in such a manner, and it is accepted, the acceptance will satisfy the ²⁴⁸ demand, although the creditor protests at the time that the amount received is not all that is due or that he does not accept it in full satisfaction of his claim. The creditor has no

alternative except to accept what is offered with the condition upon which it is offered, or to refuse it; and if he accepts, the acceptance includes the condition, notwithstanding any protest he may make to the contrary: *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717; *Bingham v. Browning*, 197 Ill. 122, 64 N. E. 317; *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *McDaniels v. Rutland Bank*, 29 Vt. 230, 70 Am. Dec. 406, 1 Cyc. 329; 1 Am. & Eng. Ency. of Law, 2d ed., 419.

In this case, the defendant sent to the plaintiff the statement of the disputed account as defendant claimed it, with memoranda of the coal received during July and of coal purchased during the period covered by the contract, with the price paid, and showing a balance of \$470.67 to be due. The check was sent with the following statement: "Inclosed please find our check on the First National Bank of Canton, No. 19,348, \$470.67, in full of account. . . . Please acknowledge receipt and oblige." The check was the means of obtaining payment of the balance shown by the statement, and it was clearly offered as payment in full of the balance due. If the plaintiff, upon receipt of the check, had retained it and had not done or said anything further, there would be no dispute of the proposition that it was accepted in full payment and satisfaction of the demand. Plaintiff could not have understood that it was authorized by the letter to accept the check as a part payment and credit it on the account, leaving a balance due. If taken at all it was to be taken as it was offered, as a payment in full; and this would be true although the bookkeeper went to the defendant's office and protested that the check was not for the whole amount due. This is not denied by counsel who complain of the ruling of the court, but they urge that Orendorff was informed that plaintiff had given credit on the account for the amount of the check, leaving a balance due, and did not object to the ²⁴⁹ retention of the check in that way or demand its return, and that from his conduct the jury might properly draw an inference that the condition on which the check was sent was waived. When Simmons went to Orendorff and told him that he had brought a statement of the balance due, Orendorff merely said that he did not owe the plaintiff anything. That was before he had seen the statement, and, so far as appears, he did not then know that the check had merely been credited on the account as a part payment. The fact that Simmons said there was a balance due would have no

weight as tending to show that defendant consented to the application of the check as a part payment. The account was unliquidated, and defendant knew that the balance had not been agreed upon. The plaintiff could not accept so much of the offer as was favorable to it and reject the remainder without the consent of the defendant, and Orendorff's statement that it was not indebted to the plaintiff did not tend to show consent. Afterward, when Simmons laid the statement down before Orendorff and told him that he had given credit on the account for the check, still leaving a balance due, and told Orendorff to mail him a check for it, he again said that he did not owe plaintiff anything. We do not see how the jury could have inferred from these repeated statements of Orendorff that he waived the condition on which the check was sent, and we do not think the jury would be justified in drawing such a conclusion from them. If the plaintiff was not willing to accept the check as sent, in full of the account and acknowledge the receipt of it as requested, it ought to have returned it. The rule that required it to do so is neither harsh nor unjust, but it secured to the defendant the right to have its check received as offered, if received at all, unless there was a subsequent waiver of that condition. We do not regard the evidence as tending to show such a waiver, and there was therefore no error in directing the verdict for defendant.

The judgment of the appellate court is affirmed.

Accord and Satisfaction is the subject of an extended note to *Harrison v. Henderson*, 100 Am. St. Rep. 390-456. Part payment as a consideration for an accord and satisfaction is discussed at pages 431-499. That the acceptance from an insolvent of part payment in full satisfaction of a claim is founded on such a consideration that the entire debt is discharged, see *Engbretson v. Seiberling*, 122 Iowa, 522, 101 Am. St. Rep. 279.

PROCTOR v. PROCTOR.

[215 Ill. 275, 74 N. E. 145.]

DIVORCE—Jurisdiction to Decree Alimony.—Service upon defendant in a suit for divorce of a copy of the complaint and notice of the commencement of the action, made at his residence in another state, does not, in the absence of his personal appearance, give the court of yet another state jurisdiction to decree payment of alimony and counsel fees by him on granting the divorce. (p. 169.)

DIVORCE—Extraterritorial Effect of Decree—Proceeding in Rem.—A default divorce decree purporting to vest in complainant an interest in real estate of the defendant situated in another state is in that respect extraterritorial, without jurisdiction, and void. (p. 169.)

C. A. Binley, W. H. McSurely and E. R. Hills, for the plaintiff in error.

276 RICKS, J. The defendant in error filed her bill in the circuit court of Cook county on the eighteenth day of April, 1901. The bill alleged the marriage of the parties, desertion for over two years on the part of plaintiff in error, and prayed that the marriage be dissolved and that the plaintiff in error be required to pay permanent alimony and solicitor's fees. No personal service was had in this state upon the plaintiff in error. The service on the plaintiff in error was by copy of the bill, with notice of commencement of suit, and was made at Piqua, Ohio, his place of residence. No appearance was entered by or for the plaintiff in error. The plaintiff in error was defaulted, and at the trial of the cause the bill was taken pro confesso. The court decreed that the marriage between the defendant in error and the plaintiff in error be dissolved, and that the defendant in error recover of the plaintiff in error the sum of five dollars a week as alimony and the sum of fifty dollar's solicitor's fees, together with an undivided one-third interest in a house and lot belonging to the plaintiff in error, situated in the city of Piqua, county of Miami and state of Ohio. From the above decree the plaintiff in error sued out a writ of error from this court to reverse the decree in so far as it relates to the recovery of five dollars per week as alimony, fifty dollars as solicitor's fees and an undivided one-third interest in a house and lot belonging to plaintiff in error, situated in the city of Piqua, county of Miami and state of Ohio. The

record shows plaintiff in error had no property within the state. The grounds relied on are, that the court did not acquire such jurisdiction of the person of plaintiff in error as authorized it to enter the money decree against him, and did not have jurisdiction to enter any decree affecting real estate in the state of Ohio.

277 That the court had no such jurisdiction of the person of plaintiff in error as authorized a money decree or decree in personam seems to be settled by the case of Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507. In that case a bill was filed to remove a cloud from real estate situated in this state. James C. Cloyd, the defendant to the bill, resided in the city of New York, and service was had upon him in that city by a copy of the bill, and notice, as in the case at bar. The defendant defaulted, and the relief prayed was granted and a judgment for costs against the defendant, Cloyd, was awarded. On error this court held that in so far as the proceeding was in rem the decree was valid, but that the court was without jurisdiction to enter a decree for costs against Cloyd, as that was in personam. In so far as the proceeding at bar related to the marital relation and its dissolution the proceeding is regarded as one in rem, and the court was warranted in entering its decree dissolving the same. But the court could go no further. It could not enter any binding decree in personam against plaintiff in error: 2 Black on Judgments, sec. 933; 9 Am. & Eng. Ency. of Law, 2d ed., 745; Rigney v. Rigney 127 N. Y. 413, 24 Am. St. Rep. 462, 28 N. E. 405; Pennoyer v. Neff, 95 U. S. 727, 24 L. ed. 565.

So much of the decree as sought to vest in defendant in error an interest in real estate in Ohio was extraterritorial and beyond the jurisdiction of the court. That part of the decree was purely a proceeding in rem, and the res having its situs in another state, must be controlled by the laws of the state of its situs: Lynn v. Sentel, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838; Pennoyer v. Neff, 95 U. S. 727, 24 L. ed. 565; Story on Conflict of Laws, sec. 359.

In decreeing alimony, solicitor's fees and an interest in the land in Ohio the court was in error, and in those respects the decree is reversed. As to the divorce no reversal is asked, and the decree remains in force and is affirmed. Plaintiff will have judgment for costs.

Decree reversed in part.

As Against a Nonresident who is not served with process in the state, and who does not appear in the action, the court cannot decree payment of alimony: *Smith v. Smith*, 74 Vt. 20, 93 Am. St. Rep. 882; *De La Montanya v. De La Montanya*, 112 Cal. 101, 53 Am. St. Rep. 165; *Rigney v. Rigney*, 127 N. Y. 408, 24 Am. St. Rep. 462. See, too, *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, and the monographic notes to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 182; *Harding v. Harding*, 102 Am. St. Rep. 709.

HOOKER v. MIDLAND STEEL COMPANY.

[215 Ill. 444, 74 N. E. 445.]

CORPORATIONS—Officers as Trustees.—Officers of a corporation occupy the position of trustees for the stockholders as a body, with respect to the business and property of the corporation, and cannot have or acquire any personal or pecuniary interest in conflict with their duties as such trustees. (p. 175.)

CORPORATIONS—Director and Stockholder—Purchase of Stock.—A director in a corporation does not sustain the relation of trustee to an individual stockholder with respect to his stock, over which the former has no control, and he may purchase such stock practically on the same terms as a stranger. (p. 175.)

CORPORATIONS—Director and Stockholder—Purchase of Stock.—In the absence of actual fraud the purchase by a director of the stock of an individual stockholder will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. (p. 175.)

FRAUD—Reliance upon Representations.—To enable a person to set aside a contract for fraud, the representations alleged to be false must be relied upon in entering into the contract. (p. 176.)

Manning, Cole & Manning, for the appellant.

Gann, Peaks & Haffenberg, for the appellees.

445 CARTWRIGHT, J. On December 15, 1899, appellant John D. Hooker, filed his bill in this case in the superior court of Cook county against the appellees, except the American Sheet Steel Company and the United States Steel Corporation, who were subsequently brought in as defendants, praying that the appellee Ross J. Beatty, or the persons whom he represented, should be required to pay appellant the difference between the amount received by appellant for stock of the Midland Steel Company and the true value thereof, or that appellant might be given the option to be reinstated as a stockholder. The material averments of the bill were, that in May, 1899, complainant, a resident of Los Angeles, California, was a stockholder in the said Midland Steel Company of Muncie, Indiana;

that he owned seventy-two shares of the capital stock, of \$100 each, out of a total of three thousand shares; that the defendant Beatty was president and the other individual defendants officers of the corporation, which was then in an exceedingly prosperous condition; that complainant received a letter from Beatty dated May 8, 1899, stating that a majority of the stockholders in number and amount had closed a deal for turning over the property of the corporation to representatives of New York capitalists; that complainant should mail his certificates, properly indorsed, to Beatty, or send them through a bank, with a sight draft for \$14,400; that complainant, to ascertain the facts, sent a representative ⁴⁴⁶ to the office of the company at Muncie to make investigation; that his agent discovered that no sale had been made, but was informed by Beatty that an option had been given for the sale of the business and assets of the corporation, and the agent made efforts to learn from Beatty the facts and particulars regarding the option and the data upon which the valuation of complainant's stock mentioned in the letter was reached, but Beatty refused full information, and complainant was unable to ascertain the true character of the option of said data. There was no statement in the letter of the price or particulars of the sale, but the amount offered complainant would be \$200 per share, and at the same rate the whole capital stock would bring \$600,000. The bill further alleged that complainant, through his agent, learned from Beatty that \$600,000 was not, in fact, the price mentioned in the option, but that the real price, if a sale should occur, was to be at least \$700,000 in cash or a larger amount in some other consideration; that in the investigation complainant's understanding of the facts was hindered by contradictory statements of Beatty as to the prospects of the corporation, saying sometimes that they were poor on account of the failure of natural gas, and at others that they were good on account of the location for obtaining coal; that in the investigation he learned from Beatty that the business had averaged a net profit, for six years, of thirty per cent per annum, and that there was a surplus in cash and undivided profits exceeding \$200,000; that complainant served a written notice that no sale of the business or assets should be made for less than \$900,000 in cash; that Beatty repeatedly declared and insisted that the majority of the stockholders were determined to sell the business and assets to a trust, and complainant, to avoid participation or interest in such an illegal combination, finally

consented, under protest, to sell his shares of stock to Beatty for \$18,000, the stock then being reasonably worth \$32,000; that through Beatty's contradictory, conflicting and untruthful statements complainant's ⁴⁴⁷ confidence in him was shaken and he was unable to believe any statement made by Beatty as to the condition of the company, either on June 14, 1899, when he sold the stock, or at the time of filing the bill; that Beatty had offered to return the complainant's stock to him at the same price paid, with interest, but that complainant was without knowledge and information in regard to the value of his stock and the existing status of the corporation, and was entitled to the assistance of a court of equity to discover the truth. The bill prayed for an answer without oath, an accounting of the condition of the corporation, and if it should appear that he was induced to part with his stock for an inadequate price he should be paid the difference between the price at which he sold it and its true value, or if the corporation was an independent one, without any outstanding option of sale to a trust, complainant might be given the option to be reinstated as a stockholder. The bill was demurred to and the demurrer was sustained with leave to amend, and thereafter a long series of amendments were filed from time to time, and amended and supplemental bills were filed.

After a reference to a master, upon which one thousand pages of testimony were taken, the complainant, on June 28, 1901, filed a petition setting forth the reference and the introduction of proof before the master, and stating that through the testimony of defendants information before unknown had been obtained that the plant and goodwill of the corporation had been sold to the appellee the American Sheet Steel Company, and that the said corporation had become merged in the United States Steel Corporation, and praying leave to file an amended and supplemental bill against said corporations, together with the original defendants. Leave was granted, and the amended and supplemental bill was filed July 1, 1901. On March 12, 1903, the complainant, by leave of court, made amendments to the amended and supplemental bill, stated by his counsel to be forty-nine in number, and on March 25, 1903, he filed what is called an ⁴⁴⁸ engrossed copy of the amended and supplemental bill as amended. A demurrer, general and special, was interposed to the amended and supplemental bill as amended and engrossed and the demurrer was sustained. The court, refusing leave to make further amendments, dismissed the

bill. The branch appellate court for the first district affirmed the decree.

The lengthy and involved nature of the so-called engrossed copy of the amended and supplemental bill as amended precludes a statement, in detail, of its contents. An outline of the transaction has been given above in a brief statement of the averments of the original bill. The bill, as it finally appeared, recited those averments and the proceedings under the original bill, and alleged that the complainant became a stockholder in the Midland Steel Company about 1892; that in July, 1897, he delegated George S. Cole, his attorney, as representative, to attend the annual meeting at Muncie, and thereby obtained a report of the matters made known at that meeting; that he had no other information except the statements of Beatty up to May 19, 1899, when Cole again visited the plant for him; that Beatty and another officer had become interested in a project to combine steel mills into a trust, and an option was given for the purchase of the plant and property, exclusive of the cash on hand and accounts and bills receivable, for \$1,000,000 preferred and \$1,000,000 common stock of the trust company; that the excluded property was worth at least \$75,000; that Beatty estimated to complainant the value of the trust stock which he stated would be received, at \$90 per share for preferred and \$60 per share for common stock, which would make the price equivalent to \$1,500,000; that the letter written to him was false in four particulars; that the purchase by Beatty at \$14,400 would be profitable to Beatty whether the option was carried out or not; that if the sale occurred Beatty would realize a large profit, and if not he would reap a stockholder's share of the profits of the Midland Steel Company; that in ⁴⁴⁰ May and June, 1899, complainant made the investigation set forth in the bill, and sought to obtain a full and satisfactory exhibit of the corporation's affairs in order to ascertain the true value of the shares of stock; that Beatty then exhibited a trial balance sheet of the corporation, and represented it to be the most accurate and complete statement, in summarized form, of the company's assets that he was possessed of or could produce; that said trial balance was incomplete because it did not show the full value of the raw and finished material on hand, and Beatty had in his possession a merchandise stock ledger containing the same; that Beatty, in answer to Cole's request, denied that he possessed any inventory, when the stock ledger showed the raw and

finished material on hand; that complainant finally sold his stock to Beatty at \$250 per share because of Beatty's statement that an option was outstanding and certain to be acted upon within a short time; that complainant believed the entire property to be under option of sale and that stockholders in general were to receive \$200 per share in cash, but that Beatty and one other defendant had a chance to exchange part of their stock for shares in the corporation, which privilege would be extended to complainant and enable him to realize \$250 per share; that, in fact, the other stockholders might receive a larger consideration in stock; that complainant suspected that the option might not be binding and might never be acted on, and at the time of the sale advised Beatty that if the sale to a trust did not occur he would reassert his right to the stock; that such right was recognized and acquiesced in by Beatty and an express offer was made by Beatty to return the stock, which was open and unrevoked when the original bill was filed; that when complainant sold his stock he only knew of the positive false statement by Beatty that there was only an option, and did not know that the consideration was different until Beatty testified in the case; that after the sale he repeatedly requested to be shown the option, but Beatty evaded and ignored his request until ⁴⁵⁰ November 5, 1899, when he notified complainant that the option had expired; that Beatty's conduct excited complainant's further apprehensions and induced him to file the bill; that in March or April, 1900, the business of the corporation was transferred to the American Sheet Steel Company for \$1,000,000 preferred stock and \$1,000,000 common stock, and the raw and finished material was sold for a large additional price; that about February 23, 1901, the stock of the American Sheet Steel Company was sold and transferred to the United States Steel Corporation for like shares of the preferred and common stock of the latter corporation. The complainant, by the bill, offered to bring into court the money received for his stock, with interest, and prayed, in the first place, for what was termed a specific performance; that inasmuch as Beatty offered to take off of complainant's hands the stock to be received in the sale of the property at \$90 per share for preferred and \$60 for common, he should be required to pay complainant the difference between the \$18,000 already paid and the value of two hundred and forty shares of preferred stock and two hundred and forty shares of common stock at said prices, and also the share of the cash

on hand, accounts and bills receivable not transferred to the trust which seventy-two shares of capital stock would entitle complainant to. The bill contained an alternative prayer that the sale of the stock should be set aside and the parties placed in statu quo. The alternative prayer for a rescission of the sale was for relief which Beatty had already offered to complainant without any suit, and the offer was open and unrevoked when the original bill was filed.

The bill averred that Beatty did not make a full and frank disclosure of all the facts within his knowledge affecting the value of complainant's stock or which would enable complainant to determine whether it would be best to sell the stock at the price offered or not. It is contended that Beatty, being the president and director of the Midland Steel Company, was a trustee for the complainant as a stockholder, ⁴⁵¹ and was therefore in a fiduciary and confidential relation requiring him to disclose all such facts within his knowledge, and that he could not retain a benefit acquired by a breach of that duty or use knowledge in his possession to obtain a bargain from the complainant. The management of the business and property of a corporation is intrusted to its officers and they are empowered to act for the whole body of stockholders. They therefore occupy the position of trustees for the stockholders as a body in respect to such business and property and cannot have or acquire any personal or pecuniary interest in conflict with their duty as such trustees. A director, however, does not sustain that relation to an individual stockholder with respect to his stock, over which he has no control whatever, but he may deal with an individual stockholder and purchase his stock practically on the same terms as a stranger. In the absence of actual fraud such a purchase will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. The rule as to a director is stated in Cook on Stock and Stockholders (section 320) as follows: "There is no confidential relation between him and a stockholder, so far as a sale of the stock between them is concerned, and so long as he remains silent and does not actively mislead the person with whom he deals the transaction cannot be set aside for fraud." Beatty did not sustain such a trust relation to the complainant, as an individual stockholder, as would prevent him, in the absence of actual fraud, from purchasing the stock: 10 Cyc. 796; Carpenter v. Danforth, 52 Barb. 581; Walsh v. Goulden, 130 Mich. 531, 90 N. W. 406; 1 Morawetz on Private

Corporations, 357. One question in the case therefore is whether there was actual fraud on the part of Beatty.

Complainant set out four particulars in which the bill alleged that the letter written by Beatty was false. The first and principal one is, that no sale had occurred but only an option had been given. That statement was corrected when ⁴⁵² complainant's agent, Mr. Cole, went to Muncie, Indiana, and was informed that there was no sale but only an option. The second alleged false statement is, that the price stated was to be \$600,000. There was, in fact, nothing said in the letter about the price, but the bill alleged that complainant ascertained before he sold his stock that the price was not \$600,000 in cash, and he did not sell his stock on that basis. The third alleged false statement was, that the cash on hand and accounts and bills receivable were to be included in the sale; and the fourth, that the letter conveyed the false impression that letters substantially like the one sent to complainant had been sent to all other stockholders. These matters are only matters of inference, and as to all the supposed misstatements it is sufficient to say that neither the letter nor the representations were ever acted upon at all. Complainant was informed through his representative that there was an option instead of a sale; that the price was different or there was some kind of an option to take stock in the trust, and instead of receiving \$14,400 for his stock, as proposed by the letter, he sold it for \$18,000 on account of his repugnance to any connection with the trust believing the stock to be worth a great deal more.

One rule always adhered to is, that to enable a party to set aside a contract the representations alleged to be false must be relied upon in entering into the contract: *Douglass v. Littler*, 58 Ill. 342; *Walker v. Carrington*, 74 Ill. 446; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Illinois Midland Ry. Co. v. Town of Barnett*, 85 Ill. 313; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862. Complainant in his bill alleged that he found out that Beatty had made misstatements; that the statements were contradictory and that he was distrustful of him, but alleged that the distrust went only to suspecting that in a doubtful case, where Beatty's own interest could be served by misconstruction, equivocation or sophistry, he would resort thereto, but at the time of the sale he was not convinced that he would perpetrate a ⁴⁵³ deliberate, positive and malicious fraud. These averments, in connection with the other facts stated, show that the sale was not made in reliance

upon representations of Beatty, and also that, in view of the knowledge complainant had, a reasonable person would not have relied upon them. Complainant made an independent investigation through his attorney, and being a stockholder he was not compelled to sell or dispose of his stock at all (*Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738), and he was not entitled to rely upon representations as to the law: *Fish v. Cleland*, 33 Ill. 238. He had a right of access to the books, records and papers of the corporation for any investigation he chose to make, and was not required to sell the stock without full information as to all facts affecting its value. It is true that the bill alleged that Beatty denied the possession of any inventory when he had a stock ledger showing the raw and finished material on hand. The bill, however, does not show that this stock ledger would answer the purpose of an inventory, and from the nature of the book the presumption is that it did not contain the values which would be set down in an inventory. The statement is not shown to be false, and, at any rate, the amount of raw and finished material on hand was open, apparently, to sight and observation of complainant's representative or anybody else. It was not alleged that there was any refusal of the privilege of a stockholder to see any of the books of the company, and if there had been it would arouse the suspicion of a reasonable man, and complainant could either insist upon his rights or refuse to sell.

The bill alleged that complainant advised Beatty, in case a sale did not occur under the option, he would reassert his right to the stock; that this right was recognized and acquiesced in by Beatty, who informed him in November, 1899, that the option had expired, and made an offer to return the stock upon complainant's refunding the money paid, with interest. The offer to return the stock was not accepted, but the complainant filed his bill asking the court to determine⁴⁵⁴ whether he should be reinstated as a stockholder upon reasonable terms or Beatty should be compelled to pay more money. The apparent purpose of the bill was to hold the status and ascertain the facts so that complainant might determine, at his leisure, whether it would be more profitable to him to retain the money and let Beatty keep the stock or accept the offer. As he alleged that the agreement was he might reassert his right to the stock and Beatty was ready and willing to perform the agreement while complainant refused to

do so, we are unable to see, by his own showing, what further right the complainant had. We do not think that a court of equity is to be used merely for the purpose of enabling complainant to determine whether he can make more money by affirming or disaffirming the sale. If complainant had accepted Beatty's offer, which he says was in accordance with the agreement, he would have been reinstated as a stockholder, so that he could have protected any right he had and would have taken the chances of profit or loss.

Aside from the foregoing considerations, if there were actual and active fraud on the part of Beatty the sale would not be void but only voidable at complainant's election, after being possessed of the necessary information. In such a case he could have the sale set aside. But Beatty had already offered to do that. As the option existing at the time the sale was made expired and a new sale was made by which there was a transfer to the American Sheet Steel Company, it is now immaterial what the original option was. Complainant alleged that he had found out, by the testimony, that the sale was made for a certain number of shares of preferred and common stock of the trust; that when he made the sale Beatty estimated the value of preferred stock in some contemplated trust at \$90 and common stock at \$60 per share. On that ground he prayed that defendants be required to pay him, in addition to the \$18,000 already paid, the excess in value of two hundred and forty shares of preferred stock ⁴⁵⁵ and two hundred and forty shares of common stock at such estimated value. The bill contained no averment that Beatty agreed to pay the price stated for the stock to be issued, but only that he estimated the value of such stock in a proposed trust to be issued in the future at those prices. It was plainly nothing but a matter of opinion, about which the complainant could form a judgment himself, and for which Beatty would not, in any event, be liable. Plainly no agreement was alleged to take the stock and to pay for it at such prices. No such absurd intention could be attributed to any reasonable business man.

Complainant invokes the rule that in actions of trover for the conversion of personal property the right of action is complete when the conversion takes place, and the action is not barred by an offer to return the property. We are unable to see how that rule applies to this case. There was no conversion of the property, but only a right of election, in case of fraud, to affirm or disaffirm the sale, and that election the complainant

refused to exercise. Beatty was not the agent of complainant, and did not in that capacity fraudulently convert the stock and realize profits out of it, and there was no trust which would enable complainant to claim the profits of a transaction realized by a trustee with his property.

We see no ground whatever upon which the bill could be maintained, and the court was clearly right in sustaining the demurrer.

The court refused to permit further amendments, and in doing so did not abuse its discretion. Complainant had been engaged for years in amending his bill, and he made an unprecedented number of amendments. The record does not show any respect in which the bill could be amended, and no amendment was presented to the court, and none is now suggested, which would enable the complainant to state a good ground for relief. The bill was properly dismissed, and the judgment of the appellate court affirming it was correct.

The judgment of the appellate court is affirmed.

The Fiduciary Relation existing between an officer of a corporation and the company and stockholders, as affecting his right to contract with it or them, is discussed in the recent cases of *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42; *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500; *Scott v. Farmers' etc. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835; monographic note to *Beach v. Miller*, 17 Am. St. Rep. 298-308. It is held in *Stewart v. Harris*, 69 Kan. 498, 105 Am. St. Rep. 178, that before a director or managing officer, having knowledge of the condition of the affairs of the corporation, can rightfully purchase the stock of one not actively engaged in the management of the concern, he must inform such stockholder of the true state of the corporate affairs.

PEOPLE v. CITY OF ROCK ISLAND.

[215 Ill. 488, 74 N. E. 437.]

MANDAMUS by Private Citizen to Enforce Public Right.—A person may, in his private capacity, institute a proceeding by mandamus to protect a public right, unless it has been lost, or an estoppel exists against the public to assert it. (p. 184.)

MANDAMUS is not a Writ of Right, and the granting of the writ is discretionary with the court in view of all of the existing facts and with due regard to the consequences which will result. (p. 184.)

MUNICIPAL CORPORATIONS—Loss of Public Right—Non-user of Street.—While a city does not lose its rights in a public

street by mere nonuse, yet if there are other circumstances, which are sufficient, together with the nonuser, to raise a presumption of abandonment, such rights are to be deemed lost. (p. 184.)

MUNICIPAL CORPORATIONS.—Doctrine of estoppel in pais is applicable to municipal corporations, but they will be estopped or not, as justice and right may require. (p. 185.)

MUNICIPAL CORPORATIONS—Equitable Estoppel.—If a person acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied against such city. (p. 186.)

MUNICIPAL CORPORATIONS—Estoppel to Assert Rights in Street.—If a city, for a valuable consideration, has granted to a railway company the right to erect structures and lay tracks on a public street, and the company, in reliance on such grant, has incurred great expense in making permanent improvements in the street, leaving a portion thereof free, sufficient for unobstructed travel, and the public has acquiesced in such condition of the street for many years, the city, the public or a private person, is estopped to assert any right to have such improvements removed. (p. 186.)

J. T. Kenworthy and S. R. Kenworthy, for the appellant.

W. L. Ludolph, city attorney, Sweeney & Walker and Lane & Waterman, for the appellees.

480 **CARTWRIGHT, J.** This is an appeal from a judgment of the circuit court of Rock Island county, denying the petition of James M. Beardsley II for a writ of mandamus commanding the appellees, the city of Rock Island and the Davenport, Rock Island and Northwestern Railway Company, to remove a depot building, freight building and freight platform from Mississippi street, in the city of Rock Island, and to prevent the use of said street for a railroad yard.

The petition alleged that the relator was a citizen and taxpayer of the city of Rock Island; that in the year 1835 the town of Stevenson, which is now the city of Rock Island, was laid out, with a street called Mississippi street extending from the north tier of blocks to the center of the Mississippi river, which street is now called First avenue; that said street was dedicated as such by a common-law dedication and was of the width of about thirteen hundred feet; that at the time of filing the petition there was erected in said street, about one hundred and fifty feet north of the south line thereof, a railway depot building, and commencing at the west end of the said building there was a railway freight-house and a freight platform extending west of the freight-house, with a railroad yard north of the same for storage, standing, loading and unloading of

freight-cars; that said street, except the south eighty feet thereof, was obstructed for railroad uses with the knowledge, consent, procurement and approval of the city of Rock Island; that said city, by an ordinance passed September 17, 1900, attempted to give the right to said railway company to construct and maintain said depot on said premises; that petitioner was the owner of a lot fronting on Mississippi street, and that he caused demand in writing to be served upon the city to cause said buildings and platform to be removed and prevent the railroad company from using a part of the public street for a railroad yard.

400 The city and the railway company filed separate answers, which were substantially identical. They admitted that the commissioners of the county of Rock Island made a map or plat of the town of Stevenson, which is now included in the city of Rock Island; that Mississippi street, or First avenue, as it is now called, has been for fifty years a public street, and that the buildings and platform described in the petition were located as therein alleged. The answers contained the following denials of averments in the petition: 1. That the depot building, freight-house and freight platform were situated in Mississippi street; 2. That the relator served a notice and demand for the removal of said depot, freight-house and freight platform; 3. That the plat annexed to the petition as an exhibit was a true map of the town of Stevenson; and 4. That the relator was a citizen and taxpayer of the city of Rock Island. To those portions of the answer four replications were filed, forming issues of fact which were submitted to a jury. The verdict of the jury on said issues of fact was against the defendants, and as the evidence produced on the trial was not preserved in the record by a bill of exceptions, no question is or can be raised as to the conclusive nature of the verdict. The answers denied that the ordinance of 1900 was intended to or purported to, or did in fact, confer upon the railway company the right to permanently occupy the premises in question for its sole and private use to the exclusion of the public, and we do not regard the ordinance, a copy of which is annexed to the petition, as granting exclusive rights of that character, although the grant is a permanent one.

The answers contained averments of many acts designed to raise an estoppel against the city to compel the removal of the buildings in question. They contained a lengthy history of the premises and the uses to which they have been applied

under grants and ordinances of the city, the making of very extensive and valuable improvements and the expenditure of large sums of money in good faith and in reliance upon such ⁴⁹¹ grants and ordinances. None of the facts so alleged were denied by replication, and they were therefore admitted on the record by the pleadings. It is not practicable or necessary to recite at length the facts so admitted. In brief they are as follows: The county commissioners, in platting the town of Stevenson, marked the land along the Mississippi river, varying in width from ninety to two hundred and sixty feet at different places, as Mississippi street. All commerce was then carried on by boats upon the Mississippi river. The river bank was used for a landing, and wharf-boats and wharf-boat structures were located along the shore. The south eighty feet of the street in front of the lots and blocks has always remained unobstructed, and has been used by the public for travel and the ordinary uses of a street. The public have never used for such ordinary public travel the space north of the said eighty feet in width, but it remained an open space, on which there was at one time a market-house, and there was also a lumber yard for loading and unloading lumber transported upon the river and for piling the same to be sold in trade. When a railroad was first built in the city, in 1856, an ordinance was passed giving it the right to construct its track on the part of the street eighty feet north of the south line. That railway company entered upon the ground and built a trestlework in the river for a long distance, and afterward filled the same, making an embankment and creating new land out of the river bed. The right to lay an additional track in connection with the handling of coal was granted in 1867, with provisions as to wharfage charges, discriminating between steamboats handling coal and those not doing a coal business. In 1869 the right to lay tracks was granted to another railroad company for an annual rental to be paid to the city, and that company made ground of considerable width in the bed of the river for the purpose of laying tracks and transacting business with steamboats. In 1878 the right was granted to a mining company to construct a railroad track and chutes for dumping coal on boats and barges. ⁴⁹² In 1879 another grant was made, and in 1895 there was a grant to a terminal company, of which the defendant railway company is successor. These grants included the use of the premises for depot grounds, and were made with a view to the commercial interests of the city and the interchange of

business by rail and river. Under these grants, and relying thereon in good faith, the defendant railway company and its predecessors in right and title expended more than four hundred thousand dollars in filling in the bed of the river, increasing the width of the open space called Mississippi street from its original width of ninety feet on the west to two hundred and thirty feet, and from one hundred and ten feet on the east to two hundred and seventy feet. The additional ground was solely made by artificial means and the expenditure of large sums of money under the ordinances. The river front was also riprapped, paved and otherwise improved. One grant was made in consideration of the payment of five thousand dollars, which was paid. During all this period neither the relator nor any other person made any objection whatever to the grants or to the use of the premises as they are now used for railway tracks and public depot grounds, and the public have never been excluded except so far as the necessary buildings have been an obstruction to passage across the premises. The relator filed a bill for an injunction against the predecessor of the defendant railway company to prevent filling along the river shore or using the premises for railroad purposes, and was paid nine hundred dollars for the right to make such filling and to make use of the rights granted by the city, and he executed a deed conveying such rights. The railway company also paid to other owners of lots abutting on the street sums aggregating forty-five thousand dollars for conveyances of rights to use and occupy the premises for railroad purposes. The depot, freight building and platform are situated about one hundred and fifty feet north of the south line of the street, and the eighty feet in width which has never been obstructed is ample for all the purposes of a street.

In the case of *Davenport Bridge Ry. Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497, we determined, following the decision in *Village* ⁴⁹³ of *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90, that the original dedication of Mississippi street extended to the north line of the tract of land upon which the town of Stevenson was laid out, which was the center of the Mississippi river. That decision was reaffirmed in *Rock Island etc. Ry. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 5. The owners of lots abutting on the street took title to the center of the street, burdened with the public easement, and those cases involved the rights of such owners to enjoin the imposition of an additional servitude on the fee until a grant should have been obtained or their

interests should be condemned and paid for. In this case it is admitted by the pleadings that the relator was paid for and granted to the railway company the right to use the premises for railroad purposes, so that he has no personal or individual right to the writ, and can only enforce the public right as a citizen of the city of Rock Island. His interest in this suit is only that which any citizen has in having the public right protected and enforced. In his capacity as a citizen he is entitled to become the relator and institute the proceeding for the protection of the public right, if it exists: *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304, 67 N. E. 785. If, however, the public right has been lost or the public are estopped he cannot succeed in his action. The buildings and platform are within the limits of a public street, and the material question is whether the city is estopped to require their removal. In determining that question all the facts as alleged and admitted are to be considered, and it is to be remembered that a writ of mandamus is not a writ of right. The granting of the writ is discretionary with the court in view of all the existing facts and with due regard to the consequences which will result: *People v. Ketchum*, 72 Ill. 212; *People v. Board of Supervisors*, 185 Ill. 288, 56 N. E. 1044.

While municipal corporations are subject to statutes of limitation concerning private rights, they are not within such statutes with respect to the enforcement of public rights. The nonuser of an easement by the public for any length of time ⁴⁹⁴ will not bar the public right under statutes of limitation, but it has been held that a city may lose its rights by nonuser if there are other circumstances which are sufficient, with the nonuser, to raise a presumption of abandonment: *City of Peoria v. Johnston*, 56 Ill. 45; *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *City of Carlinville v. Castle*, 177 Ill. 105, 69 Am. St. Rep. 212, 52 N. E. 383. In this case the circumstances would not justify a presumption that the city has abandoned the control of the premises as public grounds, but by a long course of conduct and for valuable considerations, and without objection from any person, the city has granted the right to use them for railroad purposes. It is not a case where a city or its authorities have done no affirmative act to mislead a party, or where the occupation and use have been wrongful and without apparent justification. It may be conceded that in such a case the doctrine of equitable estoppel cannot be applied. Anyone

encroaching upon an ordinary public street must know that the city holds it in trust for the public and cannot alienate it or divert it to an improper use. But here was a condition out of the ordinary. The land included in the street originally was an irregular space varying from ninety feet to two hundred and sixty feet in width, and the remainder of the land to the center of the river was subject to the easement of public navigation. The river was a highway, and when the town was laid out all commerce was carried on upon the river. The street was laid out in connection with the river, and was plainly intended for the purpose of a public landing as well as for a street: *Godfrey v. City of Alton*, 12 Ill. 29, 52 Am. Dec. 476. It was designed for the purpose of loading and unloading freight and landing passengers from the river, and for use in connection with navigation. The south eighty feet was always reserved for the ordinary purposes of a street, while the remainder along the river shore was used for market purposes and a market-house, and for loading and unloading freight and unloading and piling lumber. For nearly fifty years it has also been used for railroad purposes, including ⁴⁹⁵ depot uses, under express grants from the city, for some of which it received direct pecuniary remuneration. For very many years—much longer than the longest period of any statute of limitations—that part of the street constituting the landing and outside of the traveled way has been occupied for the public use of railroad tracks and depot grounds.

It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and if they do not, any citizen may take the necessary steps to do so, and if there

is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of everyone interested, under which the situation is changed and permanent improvements are made, the principles of equity require that the public should be estopped. The doctrine has been applied in Chicago etc. R. R. Co. v. City of Joliet, 79 Ill. 25; Chicago etc. Ry. Co. v. People, 91 Ill. 251; County of Piatt v. Goodell, 97 Ill. 84; Martel v. City of East St. Louis, 94 Ill. 67, and City of Chicago v. Union Stock Yards and Transit Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281. We think this a proper case for the application of the doctrine. Permanent improvements and great ⁴⁹⁶ expenditures have been made which would not have been made but for the positive action of the city and its officers, and to compel the abandonment of the premises for use as depot grounds would be contrary to natural justice. The relator cannot demand the writ of mandamus as an absolute right, but it is to be granted or withheld in the exercise of a sound judicial discretion, in view of all the circumstances. The facts alleged in the answers as creating an estoppel, and the fact that the public use and convenience were fully provided for by a street of at least the ordinary width, which was wholly unobstructed, were admitted. From such facts it appears that the public good would not be promoted in any substantial way by granting the writ, but, on the contrary, that the representatives of the public have always considered, and still consider, the present location of the station grounds as best for the convenience of the public. The fact that there is an unobstructed street eighty feet wide, fully accommodating public travel, does not effect any legal right to the remainder (Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393), but it is a circumstance proper to be considered in exercising the discretion confided to the court.

In view of all the facts and circumstances we think the court did not err in denying the writ.

The judgment is affirmed.

The Doctrine of Estoppel in pais can, according to the better rule, be appealed to effectively, as against a municipal corporation, only when it is acting in its private, as contradistinguished from its public or governmental capacity: Philadelphia Mortgage etc. Co. v. Omaha, 63 Neb. 280, 93 Am. St. Rep. 442; Mobile Transportation Co. v. Mobile, 128 Ala. 335, 86 Am. St. Rep. 143; monographic note to Schneider v. Hutchinson, 76 Am. St. Rep. 494, 495. Compare, however, Davenport v. Boyd, 109 Iowa, 248, 77 Am. St. Rep. 536.

The Loss of Public Streets by Abandonment is discussed in *Kelsoe v. Oglethorpe*, 120 Ga. 951, 102 Am. St. Rep. 138, and cases cited in the cross-reference note thereto. That the public cannot be barred of its right to a public street by adverse possession, see the monographic notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495; *Northern Pac. Ry. Co. v. Ely*, 87 Am. St. Rep. 778-780.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. HAMLER.

[215 Ill. 525, 74 N. E. 705.]

RAILROADS—Contract with Sleeping-car Company.—A railroad company is under no obligation to haul the cars of a sleeping-car company, and may when contracting to haul such cars, require the latter company to indemnify it against liability for personal injuries received by the sleeping-car company's employés. (p. 190.)

RAILROADS—Contract with Sleeping-car Company.—A contract of employment as porter for a sleeping-car company which releases the railroad company hauling the sleeping-cars from liability for injury to such porter is not against public policy. (p. 192.)

CONTRACT of Employment at Certain Daily Wages, payable monthly and for no particular time, though not signed by the employé at the time the contract is dated, is effective as to any occurrence happening after it is actually signed, and during the continuance of the employment. (p. 192.)

CONTRACTS.—Failure to read a contract before signing it does not affect its validity, if the person signing is able to read and write, and there was no fraud or misrepresentation. (p. 192.)

RAILROADS—Sleeping-car Employés.—A porter on a sleeping-car employed and paid by the sleeping-car company is not the employé of the railroad company hauling the sleeping-car, as he is not subject to the orders of the latter company in any manner. (p. 192.)

NEGLIGENCE, Whether Termed Slight, Ordinary, or Gross, is but the omission of duty, and, if actionable, entails but one measure of liability, unless willful or intentional, and it then assumes an entirely different character from that of mere negligence in its ordinary meaning. (pp. 192, 193.)

NEGLIGENCE—Comparative.—If injury results from failure to exercise ordinary care and not from willful or intentional failure to perform a duty, the question of the degree of negligence is of no importance. (p. 194.)

NEGLIGENCE is of Two Kinds Only, mere negligence which consists of carelessness and inattention, and willful negligence consisting of willful and intentional failure or neglect to perform a duty. (p. 195.)

NEGLIGENCE—Comparative.—Negligence, or the failure to exercise ordinary care, skill, and diligence, cannot be divided into the classes of slight, ordinary and gross, and the only question in any case is whether there is actionable negligence, and if there is, the rights of the parties are not affected by any question of the degree of such negligence. (p. 199.)

W. T. Rankin and B. S. Cable, for the appellant.

G. E. Dickson, Castle, Williams & Smith and B. M. Smith, for the appellee.

526 CARTWRIGHT, J. On January 18, 1902, Anderson Hamler, the appellee, was a porter in the employ of the Pullman company in a sleeping-car attached to a passenger train of appellant running in a westerly direction in the state of Iowa. As the **527** train passed through a station called Victor the engine exploded. The engineer and fireman were killed and the Pullman sleeping-car in which appellee was at work was thrown on its side and he was injured. He brought this suit in the circuit court of Cook county to recover damages for his injuries, and alleged in each count of his declaration that he was employed by the Pullman company as a porter; that his duties were the care of the sleeping-car, the making up and taking down of berths therein and providing for the necessities and comforts of passengers, and that he was, with all due care and diligence, performing his duties as such porter when the car was thrown from the track. In the first count he charged negligent, careless and wrongful management and operation of the boiler which exploded and threw the car from the track. In the second count he alleged that the engine was negligently, carelessly and wrongfully equipped with a defective boiler, and the third count contained a general charge of the negligent operation of the train, causing the car to be thrown from the track. There was a plea of the general issue, and upon a trial there was a verdict of guilty and damages were assessed at fifteen thousand dollars. On a motion for a new trial plaintiff remitted seven thousand five hundred dollars and judgment was entered for seven thousand five hundred dollars. Appellant appealed from the judgment to the appellate court for the first district, where the cause was assigned to the branch of that court. One of the judges of the branch court presided at the trial in the circuit court and took no part in the consideration of the appeal, and the other judges disagreeing, the judgment was affirmed by operation of law. One of the judges was disqualified and the judgment became final as to controverted questions of fact by operation of law, and not by consideration and judgment of the court.

On the trial the defendant offered in evidence a contract of employment with the Pullman company, dated January 2, 1902, signed by the plaintiff, the execution of which was admitted by

him and which fixed the terms and conditions upon ⁵²⁸ which he accepted the employment and entered into the service of said company. Among other things, the contract recited that plaintiff was aware that the Pullman company secured the operation of its cars upon lines of railroad by means of contracts wherein said company agreed to indemnify the corporations or persons owning or controlling such lines of railroad against liability on their part to the employés of said Pullman company, and he thereby released the corporations or persons over whose lines of railroad the cars of said Pullman company might be operated, from all claims for liability on account of any personal injury to him while traveling over such lines in said employment or service. This contract was the basis of the defense to the suit, and the defendant tendered to the court an instruction to be given to the jury, that the defendant was not a common carrier of the sleeping-cars of the Pullman company; that it could not be compelled to haul such sleeping-cars, but might or might not haul the same, as it desired; that if it undertook to haul such cars in its trains it might do so, and in so doing might make such contract or demand such conditions as would protect it from liability for injury to the porter or other employés of the Pullman company on the said cars through negligence, and that if the plaintiff voluntarily entered into the agreement releasing the railroad company from all liability for any injury he might receive while acting as a Pullman porter he could not recover, and the verdict should be that the defendant was not guilty. The court refused to give the instruction.

The principle involved and the rights of the parties under such a contract as this were considered and decided in *Blank v. Illinois Cent. R. R. Co.*, 182 Ill. 332, 55 N. E. 332, which was an action brought by an employé of the American Express Company for personal injuries received while engaged in the service of that company in an express-car. The defense was a contract made by the plaintiff with the express company to obtain employment, by which he released from any liability ⁵²⁹ to him any corporation operating any railroad over which the express-cars should run. It was decided that such a contract is valid and not void as against public policy, and that the direction of the court to find the defendant not guilty was justified by the contract, which was a complete defense. There is no difference whatever, in principle, between the case of a porter on a car of the Pullman company and a messenger in an express-car. It is no part of the contract or obligation of

a common carrier of passengers to furnish berths, or the services of a porter to make up beds or perform other services for passengers. The passenger pays the Pullman company for the services performed by it, and not the railroad company, and if one desires such services as are rendered by the Pullman company and its porter he must contract with that company for them. In its business as a common carrier of passengers a railroad company is bound to carry all who apply and to treat all alike, and its duties and obligations to them are imposed by law. The obligations of a common carrier arise from the public nature of the employment, and being imposed by law, it would be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. A railroad company, in its business as a common carrier, undertakes to use the care and diligence required by law in the transportation of passengers, and will not be permitted to absolve itself from its duties by a stipulation in the contract of carriage by which a passenger is to take the risk of its negligence; but if the service is one that is not imposed upon it as a duty, it may undertake it upon such terms as it may see fit. There can be no doubt that the defendant is not bound to haul sleeping-cars tendered to it by the Pullman company, with its conductors, porters or other employés. The defendant is a common carrier of passengers, and as to them it assumes the duties and liabilities of a common carrier, but the Pullman company furnishes special facilities and services to passengers, and the ⁵³⁰ defendant is not a common carrier of Pullman cars and employés performing duties therein. The defendant might undertake to receive and haul the cars of the Pullman company, but in doing so had a right to impose such terms as it might elect. This has been the opinion of the courts in all cases involving such contracts as the one here in question, which have been enforced in cases of express-cars, circus trains and Pullman cars, which the carrier was not bound to receive and haul as a common carrier: *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506, 31 N. E. 652; *Louisville etc. R. R. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, 38 L. R. A. 93; *Pittsburg etc. Ry. Co. v. Mahoney*, 148 Md. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 526, 32 Am. St. Rep. 482, 31 N. E. 650; *Griswold v. New York etc. R. R. Co.*, 53 Conn. 371, 55 Am. Rep.

115, 4 Atl. 261; Coup v. Railroad Co., 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; Express Cases, 117 U. S. 1, 6 Sup. Ct. Rep. 542, 29 L. ed. 791; Peterson v. Chicago etc. Ry. Co., 119 Wis. 197, 100 Am. St. Rep. 879, 96 N. W. 532; Donovan v. Pennsylvania Co., 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140; New York etc. R. R. Co. v. Difendaffer, 125 Fed. 893, 62 C. C. A. 1; McDermon v. Southern Pac. Ry. Co., 122 Fed. 669. In the last two of these cases the validity of the contract with the Pullman company was involved. In the case of Blank v. Illinois Cent. R. R. Co., 182 Ill. 332, 53 N. E. 332, appellant relied upon the decision of Judge Taft in Voigt v. Baltimore etc. Ry. Co., 79 Fed. 561, but that decision was reversed by the supreme court of the United States in Baltimore etc. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. Rep. 385, 44 L. ed. 560, where it was held that Voigt could not avoid his agreement on the ground that it was against public policy. The court, affirming the doctrine that a common carrier of passengers cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, said: "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function ⁵³¹ of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." Upon an extensive review of the authorities it was decided that the contract was not against public policy, but was valid and constituted a defense to the action.

It is urged, however, that the contract in this case was without consideration, and was therefore void. Upon the cross-examination of the plaintiff he was presented with the contract and admitted that he signed it. It bore date at the time of his employment by the Pullman company, but after it was introduced in evidence by the defendant he was called in rebuttal and testified that it was executed by him about seven months after he was employed by the Pullman company, and that he did not read it. It is on the ground that the contract was executed after the employment began that counsel urge it was without consideration. There was evidence that the contract was signed before employment was given to the plaintiff; but whatever the fact may be, the employment was at certain daily wages, payable monthly, and for no particular time. The contract bore date

at the commencement of the service, and recited on its face that it was entered into in consideration of the employment. If it was signed as he claimed and the employment continued, it would be, in any event, effective as to any occurrence after its execution. It does not seem to be claimed that plaintiff was not bound by the contract because he did not choose to read it. He testified that he was able to read and write, and there was no evidence of fraud or misrepresentation or that he was in any manner prevented from reading the contract. Under such circumstances the fact that he did not read it does not affect its validity.

It is contended that plaintiff was a servant of the defendant, and that the contract was also void as a contract between master and servant. The declaration averred that the ⁵³² plaintiff was in the employ of the Pullman company, and, as a question of fact, the uncontradicted evidence was that the Pullman company owned the car and had charge of its operation; that it employed the men who ran its cars, paid the porters, and that the defendant paid a compensation to the Pullman company for running the Pullman cars over its road. The master of a servant is one to whose order he is subject, and the plaintiff was not subject to the order of the defendant in any particular and therefore was not its servant. Under this head it is also urged that no contract was proved between the defendant and the Pullman company. Plaintiff's contract recited that the Pullman company secured the operation of its cars on lines of railroad by means of contracts, and it released from liability any corporation over whose lines the cars should run. In *Russell v. Pittsburg etc. Ry. Co.*, 157 Ind. 305, 87 Am. St. Rep. 214, 61 N. E. 678, 55 L. R. A. 253, in which a contract identical with this one was under consideration, the supreme court of Indiana held that the contract, referring generally to the transportation companies over whose lines the Pullman company should run its cars, comprehended the appellee in that case; that the contract was prima facie for its benefit, and that it would be presumed to have accepted its provisions and might claim rights under it as one in whose interest it was executed.

Finally, it is contended that a contract of this character only exempts from liability for ordinary negligence, and is no defense in an action for an injury caused by gross negligence. It is contended that if the degree of negligence is high and the negligence great the agreement is of no effect, and the trial court adopted that view in giving instructions to the jury. In the

first instruction the court defined gross negligence as the want of slight diligence and care, and in other instructions told the jury that if the plaintiff was not guilty of negligence and the defendant was guilty of gross negligence they should find for the plaintiff, and that if the contract in evidence was signed by the plaintiff and he was ⁵³³ not guilty of negligence and the defendant was guilty of gross negligence causing the injury, the contract was not a good defense and they should find for the plaintiff. The cause of the explosion was not definitely proved, but there was evidence that tended to show that the water was low in the boiler. The engineer and fireman were both killed, and it can never be known whether they were misled on account of the water gauge or other appliances not working properly. There was no evidence tending in the remotest degree to prove that there was any willful or intentional failure on the part of either of them to perform any duty respecting the boiler or the management of it. Their own safety was involved, and there can be no presumption that they lost their lives through a willful or intentional disregard of duty.

We are of the opinion that no distinction as to the rights of the parties can be founded upon speculation as to different degrees of mere negligence, and that the trial court erred in instructing the jury to find for the plaintiff if they concluded that the defendant was guilty of gross negligence. Formerly, this court, in expounding the doctrine of comparative negligence, classified negligence into three degrees, as slight, ordinary and gross; but that doctrine was long ago abolished, and while negligence may since that time have been alluded to in opinions as gross or slight, no weight has been given to the question and no liability has been based on any distinction in degrees unless the negligence was willful or intentional, where it assumes an entirely different character from that of negligence in its ordinary meaning. In negligence, merely, there is no intention to do a wrongful act or omit the performance of a duty: *Chicago etc. R. R. Co. v. Johnson*, 103 Ill. 512. Even when gross it is but the omission of a duty: *Jacksonville Southeastern Ry. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093. The many refinements concerning the degrees of such omissions of duty grew out of the application of the rule of comparative negligence, ⁵³⁴ and were devested of all importance by the decision that to justify a recovery the person injured must be in the exercise of ordinary care and the injury must have resulted from a want of ordinary care on the part of the defendant: *Calumet Iron etc.*

Co. v. Martin, 115 Ill. 358, 3 N. E. 456. The rule since that time has been, that if a plaintiff has exercised ordinary care and the defendant has failed to exercise due care—i. e., the care demanded under the circumstances—the rights of the parties are thereby fixed and determined and there is an end of controversy. If those conditions exist there is actionable or culpable negligence, which will justify a recovery of damages resulting therefrom—and it makes no difference in the liability or the damages by what name the negligence is designated. Where an injury results from a failure to exercise ordinary care and not from a willful or intentional failure to perform a duty, the question of degree is of no importance. Speculations on that subject lead to no practical result, as shown by the various cases, among which is *Lake Shore etc. Ry. Co. v. Hessons*, 150 Ill. 546, 37 N. E. 905, where it was said that slight negligence is not necessarily incompatible with due and ordinary care, and inasmuch as there is no negligence unless there is a failure to exercise due care, which is the care required by law under the circumstances of a case, the remark was equivalent to holding that slight negligence was not negligence at all.

Where the doctrine of comparative negligence is not applied the authorities make no distinction in rights, duties or liabilities based on degrees of negligence. Judge Cooley, in his work on *Torts* (page 630), says: "Some writers classify negligence as gross negligence, ordinary negligence and slight negligence. But this division only indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown." Judge Thompson classifies negligence as of two ⁵³⁵ kinds: negligence, which consists of carelessness and inattention, and willful negligence, consisting of willful and intentional failure or neglect to perform a duty; and he repudiates any further classification. He says (1 *Thompson on Negligence*, sec. 18): "Lord Holt, C. J., in a celebrated case divided diligence into three degrees: slight, ordinary and gross. In this he is supposed to have made an attempt to follow the Roman law; but later investigators have pointed out that *culpa levissima*, or slight negligence, was unknown to the Roman law, but was one of the refinements of the middle ages. I confess myself careless, ignorant and indifferent upon this whole subject of the degrees of negligence. It is plain that such refinements can have no useful place in the practical administra-

tion of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases in admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. . . . No effort can extract from the current American decisions the conclusion that there are three degrees of culpable negligence: slight, ordinary and gross. On the one hand, it has been held that slight negligence may be compatible with ordinary care, and therefore not actionable at all. On the other hand, it has been laid down that there is no distinction between gross negligence and the want of ordinary care. . . . If the care demanded is not exercised the case is one of negligence, and the legal liability is made out when the failure is shown." The author of the chapter on Negligence in the American and English Encyclopedia of Law (second edition, volume 21, page 459), says: "While not infrequent references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands, and hence it is more accurate ⁵³⁶ to call it simply negligence. Some decisions even go further, and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence; that it is useless and tends to confusion, and that, in fact, it is unsafe to base any legal decisions on distinctions in the degrees of negligence."

One of the reasons given by the courts for disregarding supposed distinctions in degrees of negligence is the inability to give the terms "slight," "ordinary" and "gross" any definite meaning and the impracticability of applying any rule based on the supposed distinction. It is clear that negligence cannot be divided into slight, ordinary and gross by definite lines, so that a jury may understand the limits of each and assign each case to its own department. In *Hinton v. Dibbin*, 42 Eng. Com. L. 847, Lord Denman said: "Again, when we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning might have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it may well be doubted whether between 'gross

negligence' and negligence merely, any intelligible distinction exists."

In *Steamboat New World v. King*, 16 How. 469, 14 L. ed. 1019, it was said: "The theory that there are three degrees of negligence described by the terms 'slight,' 'ordinary' and 'gross' has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. . . . Recently the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions and have complained of the impracticability of applying them. . . . It may be added that some of the ablest commentators on the Roman law and the civil code of France have wholly repudiated this theory of three degrees ⁵⁸⁷ of diligence as unfounded in principles of natural justice, useless in practice and presenting inextricable embarrassments and difficulties."

In *Perkins v. New York Cent. R. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281, the court of appeals said: "The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the utter impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly, before cases are made to turn, by verdicts of juries, upon any such distinction, the judges should be able to define with some precision what they mean by gross negligence, slight negligence and ordinary negligence. It will be seen, on examining the many cases reported where the question has arisen, that this has been found utterly impracticable by judges when called upon to instruct juries upon the question and also when called on to declare the law more carefully in bank. . . . What is negligent in a given case may easily be affirmed by a jury, but in what degree the negligence consists in any scale of classification of degrees of negligence is not so easily determined, will ordinarily be a matter of pure speculation and of no practical consequence."

In *Wilson v. Brett*, 11 Mees. & W. 113, it was held that there is no legal difference between negligence and gross negligence; that it is the same thing with the addition of a vituperative epithet, and that the question in any case is whether there was culpable negligence.

In *Grill v. General Iron Screw Collier Co.*, 1 Com. P. 600, it was complained that the lord chief justice misdirected the

jury because he made no distinction between gross and ordinary negligence. In deciding the case Willes, J., said: "I quite agree with the dictum of Lord Cranworth in *Wilson v. Brett*, 11 Mees. & W. 113, that gross negligence is ordinarily negligence with a vituperative epithet—a view held by the exchequer chamber: *Beal v. South Devon Ry. Co.*, 3 Hurl. & C. 336. Confusion has ⁵³⁸ arisen from regarding negligence as a positive, instead of a negative, word. It is really the absence of such care as it was the duty of the defendant to use."

In the case of *Beal v. South Devon Ry. Co.*, 3 Hurl. & C. 336, above referred to, the failure to exercise reasonable care, skill and diligence was called gross negligence, although it would be called ordinary negligence under most definitions where there is any division into degrees.

It will be found that the words "slight," "ordinary" and "gross," as applied to negligence, are not used in the decisions with the same meaning or any definite and well-understood meaning. Illustrations are numerous, but a few will suffice for the present purpose. The words "gross negligence" are often used as the antithesis of "slight care," but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by the law. The absurdity of such a standard for determining supposed degrees of negligence is manifest. It has been noted that slight negligence is not regarded as inconsistent with due care, and if due care is exercised there is no actionable negligence, and therefore, in a legal sense, no negligence at all. In *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. 115, it was held that a slight want of ordinary care on the part of the plaintiff contributing proximately to cause the injury would defeat his action, while only slight negligence on his part contributing thereto would not. The supreme court of Wisconsin also holds that no mere degree of carelessness or inadvertence constitutes gross negligence (*Decker v. McSorley*, 116 Wis. 643, 93 N. W. 808), and that the term "gross negligence" signifies willfulness, involving intent, actual or constructive, to cause injury, and if one is guilty of willful misconduct causing injury to another the former's fault is denominated gross negligence: *Rideout v. Winnebago Traction Co. (Wis.)*, 101 N. W. 672. In *Kansas City R. R. Co. v. Crocker*, 95 Ala. 412, 11 South. 262, the court ⁵³⁹ drew a distinction between negligence charged to be reckless and a willful and wanton injury, and in *Stringer v. Alabama Mineral*

R. R. Co., 99 Ala. 397, 13 South. 75, it was said: "The words 'gross,' 'reckless,' when applied to negligence per se, have no legal significance which imports other than simple negligence or a want of due care." The court recognized but two grades of negligence one being simple negligence or the want of due care, and the other such reckless or wanton disregard of probable consequences as to be equivalent to an intentional injury, and expressed doubt whether the latter could be strictly and technically called negligence—certainly a well-founded doubt. In *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 140, 11 S. E. 316, it was held that in torts there is no degree of negligence which can be described by the word "gross" alone. In *Milwaukee etc. R. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374, the court, after citing and quoting from the English decisions holding that there is no intelligible distinction between ordinary and gross negligence, said: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it means the absence of care that was necessary under the circumstances." In *Smith v. New York Cent. R. R. Co.*, 24 N. Y. 222, it was said: "Attempts have been made to fix a liability upon the distinction between gross negligence and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence does not change its character and become anything but negligence by the application of any epithet to it."

The United States circuit court of appeals for the seventh circuit considered the same question involved in this case in *Kelly v. Malott*, 135 Fed. 74, at the October term, 1904. The suit was for damages on account of the death of a messenger of the Adams Express Company, and the declaration charged that he was killed in a collision that occurred through the gross negligence of the defendant. A contract similar to the one in this case was pleaded, and the question was whether the injection⁵⁴⁰ of the word "gross" in the declaration made out a case despite the plea. The court said: "It seems to us that the whole attempt to classify negligence has resulted from a misapprehension. 'Negligence' is merely a word of denial. 'Care' is the positive word. It is familiar and sound doctrine that there are degrees of care. But 'care' cannot properly be divided into abstract and absolute classes. The quantum of care required in a particular case is determined from the relations of the parties and the facts of the situation, and is

proportionate to the danger reasonably to be apprehended. Whatever the required degree of care, the failure to measure up to it is the ground of complaint. But failure is failure. The cause of action flows from the failure to exercise the full degree of care that was due. The injuries are what they are. The innocent sufferer is entitled to full compensation on account of the defendant's failure to bestow the fullness of care demanded by the situation. He is to receive no more, no less, than full compensation, because, though the defendant's lack may be a variable, any lack supplies a cause of action, and his injuries, which measure the value of the cause of action, are a constant. The division of negligence into slight, ordinary and gross may have originated in an endeavor, unconscious perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty and thereby causes an injury should make complete compensation. But to warrant punishment there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.' The substantive remains the same substantive, whatever the adjective. In *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, the supreme court said: 'In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern ⁵⁴¹ authorities. . . . In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it': See, also, *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 489, 492, 23 L. ed. 374; *Purple v. Union Pac. R. R. Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 100."

Whether the use of the word "willful" negligence is proper and consistent or not, there can be no doubt that it is not equivalent to gross negligence, and the question whether exemplary damages shall be awarded does not justify any classification into degrees, since negligence, however gross, will not authorize such damages. A tort must be aggravated by an evil intent to enable a party to recover exemplary damages: *Milwaukee etc. Ry. Co. v. Arms*, 91 U. S. 489, 492, 23 L. ed. 374. The only question in any case is whether there is actionable negligence,

and if there is, the authorities establish the proposition that the rights of the parties are not affected by any question of the degree of such negligence. The instructions that the contract was not a good defense in case the jury found the defendant guilty of gross negligence were incorrect and should not have been given.

At the close of all the evidence there was a motion on the part of the defendant to direct a verdict of not guilty. The court denied the motion and refused to give the instruction. Under the authority of *Blank v. Illinois Cent. R. R. Co.*, 182 Ill. 332, 55 N. E. 332, that instruction should have been given.

The judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court.

Mr. Justice Magruder, dissenting.

A Railroad Company, it has been held, may by contract relieve itself from liability to an express messenger for personal injuries suffered by him while riding on its trains in the performance of his duties: *Peterson v. Chicago etc. Ry. Co.*, 119 Wis. 197, 100 Am. St. Rep. 879. And it has also been held that a contract between a sleeping-car company and its employé, releasing transportation companies over whose lines its coaches may operate from all liability for personal injuries to him is valid, and inures to the benefit of a railroad company hauling a coach in which the employé is injured: *Russell v. Pittsburgh etc. Ry. Co.*, 157 Ind. 305, 87 Am. St. Rep. 214.

The Doctrine of Comparative Negligence has been repudiated in many jurisdictions: See *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, and cases cited in the cross-reference note thereto: *Denver etc. R. R. Co. v. Peterson*, 30 Colo. 77, 97 Am. St. Rep. 76.

The Failure to Read a Contract before signing it as affecting its validity and the right to attack it is discussed in *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521; *Wilcox v. American Tel. etc. Co.*, 176 N. Y. 115, 98 Am. St. Rep. 650; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

VOSS v. WATERLOO WATER COMPANY.

[163 Ind. 69, 71 N. E. 208.]

CONSTITUTIONAL LAW—Construction of Provisions Adopted from Other States.—Where a constitutional provision appears to have been in force in several states before it was adopted in this, it cannot be assumed to have been taken from the constitution of any one of such states for the purpose of applying the rule that when a constitution or statute, or any part thereof, is taken from another state, it will be deemed to have the meaning given to it by the courts of that state before it was adopted. (pp. 212, 213.)

MUNICIPAL CORPORATIONS—Expenses Which do not Constitute Indebtedness Limited by the Constitution.—If a town contracts for water or light or other things which pertain to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly, such contract does not create an indebtedness for the aggregate sum of all such payments, within the meaning of article 13 of the constitution, but if the indebtedness of a town already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness as it comes into existence, including other expenses for which the town is liable, an indebtedness is created in violation of such article. (pp. 213, 214.)

MUNICIPAL CORPORATIONS.—The Effect of a Constitutional Inhibition as to the Creation of Indebtedness is to require the municipal corporation indebted to the limit fixed by the constitution to carry on its corporate affairs while so indebted on a cash basis, and not on credit to any extent or for any purpose. (p. 214.)

MUNICIPAL CORPORATIONS—Limitations upon Indebtedness.—While the expense for water and light in a town or city is an ordinary and necessary expense, the construction of waterworks or an electric light plant by such town or city is not in any sense an ordinary or necessary expense, but an extraordinary one. There is a clear distinction between a contract for water and light for a public use and one for the construction of a water and light plant to furnish the same. (p. 214.)

MUNICIPAL CORPORATIONS—Indebtedness, Attempts to Evade Constitutional Restriction of.—A municipal corporation cannot evade the restriction upon its power to become indebted by issuing

bonds, payable only out of a fund raised by a special tax levy and collected for that purpose (providing the same are not for special benefits), or payable only out of the rental or income of water or light plant or the other property owned by such corporation, or by buying property subject to liens, although the municipality does not assume or agree in terms to pay such liens, or by providing that such lien shall be paid only out of a special fund raised by taxation for that purpose or only out of the income of such property. (pp. 214, 215.)

MUNICIPAL CORPORATIONS.—The Taxes, General or Special, of a Municipal Corporation cannot be Anticipated or Pledged beyond the limit to which it may become indebted, unless the tax has been actually levied and warrants drawn payable out of that fund and be such in effect as to discharge the municipality from liability. (p. 216.)

MUNICIPAL CORPORATIONS—Indebtedness, Attempt to Evade Constitutional Restriction of.—A municipality which cannot provide for the construction and erection of a plant to furnish water and light for public purposes without creating an indebtedness beyond the constitutional limit cannot evade the constitutional provision by subscribing for stock in a corporation organized for the purpose of furnishing such light and water, and by issuing bonds to raise the money necessary to be used by the corporation, and agreeing to rent certain hydrants at a rate and for terms specified, and to apply the rentals to the payment of the principal and interest of such bonds. Such a scheme is an attempt of the municipality to do by a corporation practically owned by it what it has no power to do, and is prohibited from doing. (p. 217.)

CONSTITUTIONAL and Statutory Law, Construction of.—Courts should so construe all constitutional and statutory provisions as to suppress all evasions for the continuance of the mischief and as to defeat all attempts to avoid in an indirect and circuitous manner that which is prohibited. (p. 218.)

MUNICIPAL CORPORATIONS, Indebtedness, Attempts to Exceed Constitutional Limit.—It is not Material that there was no Fraud on the part of any of the parties in adopting ordinances or taking other steps in relation to the establishment of a water and light system for a municipality, if it appears that the scheme attempted to be authorized must result in municipal indebtedness in excess of that permitted by the constitution. (p. 218.)

MUNICIPAL CORPORATIONS have Only the Following Powers: 1. Those granted by express words; 2. Those necessarily implied or incident to the powers expressly granted; and 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. All doubtful claims of power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. (pp. 218, 219.)

MUNICIPAL CORPORATIONS, Power of, to Take Stock in Other Corporations.—A town or city has no power to become a stockholder in a waterworks or other corporation, or to borrow money by the issuing of bonds or otherwise to pay for such stock, unless express authority to do so is given by statute. (p. 219.)

MUNICIPAL CORPORATIONS, Power of, to Take Stock in a Corporation.—Though a municipal corporation is by statute authorized to subscribe for stock in a waterworks company or association, it is not authorized to subscribe for stock in a corporation to furnish both water and light. (p. 221.)

C. M. Phillips and P. V. Hoffman, for the appellants.

W. H. Leas, Allen Zollars, F. E. Zollars and C. H. Worden, for the appellees.

⁷⁰ MONKS, J. Appellants, resident taxpayers of the town of Waterloo, brought this action to enjoin the board of trustees of said town from issuing the bonds of said town to pay ⁷¹ for the stock in the Waterloo Water Company, and all appellees from taking any steps to establish or construct a water and light plant in said town, and from making any contracts concerning the same. A trial of said cause resulted in a special finding and conclusions of law thereon and final judgment in favor of appellees.

It appears from this special finding that the assessed valuation of the property in the town of Waterloo for "state and county taxes" in 1901 was \$385,000; the population was twelve hundred and forty-four, and the indebtedness of said town was \$1,600. Said town could not construct a waterworks and electric light plant for the town, for the reason that said town had not sufficient money for that purpose, and could not borrow the money to construct the same without creating an indebtedness exceeding the constitutional limit, all of which was known to appellees; that the board of trustees of the town of Waterloo, desiring to secure for said town and the inhabitants thereof a supply of water and electric light for lighting the streets of said town, consulted with the president of the Olds Construction Company of Fort Wayne, Indiana, which company was engaged in the business of erecting water and light plants for cities and towns and private corporations, in regard to the way to procure the same. He represented to said board of trustees that a combined water and light plant could be put up for said town for about \$21,000, using the grounds and buildings of the town hall and fire-engine room belonging to said town for the location of said plant. He also suggested to said board that a company be organized in which the town should take stock to an amount not exceeding the constitutional limit; that said company should issue its negotiable bonds in the sum of \$17,000, with six per cent interest, running a series of years; that said town should levy and collect electric light and waterworks taxes as provided by law, and pay the same to a trustee for the bondholders, and that a part of the moneys so paid to such trustee should be used in ⁷² paying the interest on said bonds, and the balance should consti-

tute a sinking fund for the payment of said bonds; that by such stock subscription and the payment of said bonds by the application of said taxes to interest and sinking fund the town would eventually become the owner of said plant. Said board of trustees instructed the president of said construction company to have prepared a set of plans and specifications for such water and light as might be suited to the needs of said town, for which the town was to pay him \$100. Said plans and specifications were afterward prepared by the president of said construction company, and approved by said board of trustees, and filed in the office of the clerk of said town. No notice was given in any newspaper of the letting of the contract to construct said plant, but on September 2, 1901, the clerk of said town, pursuant to the direction of said board of trustees, sent out to certain companies, firms and persons engaged in the construction of water and light plants for towns the following, which had been prepared by the president of said construction company:

“NOTICE.

“The town of Waterloo, Indiana, desires to secure the erection of a waterworks and electric light plant, and to that end will grant a franchise to the party or parties whose proposition seems to the town board to be most favorable to the interest of the town. In order that all proposals may be on the same basis as to size, kind, quality and quantity of material, machinery, etc., the town board has adopted plans and specifications which are on file at the office of the town clerk, Waterloo, Indiana. Each proposal must state specifically the cost of the plant completed ready for operation in accordance with the plans and specifications and must be accompanied by a general outline of the franchise required by the bidder. The franchise must provide for the purchase or lease of the plant by the town at any time after its completion. Propositions must be in the hands of the clerk before 7 o'clock Monday evening, September 16, 1901, at which time the town ⁷³ board will meet to consider and take action upon them. All propositions must be accompanied by a certified check in the sum of \$500, payable to the order of the town treasurer to be forfeited to the town of Waterloo in case the bidder fails or refuses promptly to submit a franchise and proceed with the erection of the plant.

“STEPHEN A. BOWMAN,

“Town Clerk.”

On September 16, 1901, said board of trustees received two bids for the construction of said plant, and said board awarded the contract to the Olds Construction Company, whose bid was as follows:

“Ft. Wayne, Indiana, September 16, 1901.

“To the Honorable Board of Trustees, Town of Waterloo, Indiana.

“Gentlemen: If granted a franchise to be drawn in the form usual in such cases, we will construct in the town of Waterloo, a waterworks and electric light plant in strict accordance with the plans and specifications now on file in the office of the town clerk, and under your supervision and to your approval, for the sum of \$21,795. It is understood and agreed that the town board shall lease or sell sufficient ground for the boiler-house and space in the town hall for the machinery as shown in the drawings now on file. And the town shall rent not less than fourteen hydrants and twenty-three arc lights for the term and at the price stipulated in the franchise. The town shall also subscribe \$6,000 to the capital stock of the company which shall come into possession of the plant. Very truly yours.”

Signed by the Olds Construction Company.

At the time of awarding said contract said board of trustees directed the president of said construction company to have a company incorporated and ordinances prepared for the purpose of carrying out the plans he had explained to said board, as heretofore stated. Thereafter, said president caused duplicate articles of incorporation of the Waterloo Water Company to be prepared, signed, acknowledged, and filed as provided in section 5051 of Burns' Revised Statutes of 1901, section 3851 of 74 Revised Statutes of 1881 (Horner's Rev. Stats. 1901). The capital stock was fixed at the sum of \$25,000 divided into one thousand shares of \$25 each. The object of said corporation, as set forth in the articles of association, was to “manufacture power to furnish to the town of Waterloo, De Kalb county, in the state of Indiana, and its citizens, good and wholesome water; also electric light for both public and private use, and to own and hold the machinery, lands, tenements, easements, franchises, conduits, mains, plants, posts, poles, wires, and all other necessary appliances for supplying the same to said town.” Said articles of association were so filed on September 20, 1901, and were signed and acknowledged by three persons who were named as the directors of said corporation for the first year, and each, immediately after filing said articles,

subscribed for one share of stock in said corporation. One of the signers of said articles of association was, when he signed the same, and still is, a director, the president and general manager of the Olds Construction Company, and one of said signers was then, and ever since has been, a director and the vice-president of said construction company, and the other was then, and still is, the attorney for said construction company. On September 20, 1901, said board of trustees passed three ordinances, numbered 5, 6 and 7, to carry out the plan outlined by the president of said construction company. The first ordinance known as "ordinance No. 5," granted to the Waterloo Water Company a franchise for fifty years "to erect, establish, construct, maintain and operate within said town a system of waterworks according to such plans and specifications as may be adopted by said water company with the approval of the board of trustees of said town," and to use the streets, alleys, parks, and public grounds of said town for the purpose of constructing, operating, and maintaining within said town said system of waterworks for furnishing water to said town and its inhabitants, provided that the construction, erection, equipment ⁷⁵ and operation of said system of waterworks shall be under the supervision of the board of trustees of said town and its engineer, or any agent appointed by it; provided, further, that such grant if accepted should be irrevocable, subject only to the right of said town to purchase said system of waterworks at any time at a price not to exceed the cost of construction and cost of additions thereto. In case the Waterloo Water Company, its successors or assigns, shall have issued any bonds for the construction, extension, or equipment of said system of waterworks, and secured the same by mortgage on said plant and franchise, the lien of such mortgage shall not be affected by such purchase, but if said town shall become the owner of said system of waterworks by purchase, as provided in this ordinance, the right or title of said town shall be subject to full payment of said bonds and the lien of said mortgage, and also to the payment of the hydrant rentals provided to be paid by said town under the provisions of this ordinance and said hydrant rentals shall continue to be paid by said town in accordance with the provisions of this ordinance to the trustees named in this ordinance, upon the trust and upon the conditions contained therein; and said mortgage shall continue a first lien on all property, franchises, and rentals herein described until the full payment of said bonds, principal, and interest, and shall

have the same force and effect as if the title to said property had remained in said water company.

The second section of said ordinance granted the right to occupy and use the ground and building upon which the town hall and fire-engine room were situate, for constructing, maintaining and operating thereon said water and light plants for the term of fifty years, with a provision that all the buildings and machinery erected or placed on said grounds should be considered personal property and in no case to become fixtures or regarded as real estate. The number of pumps, their capacity, the length of the water-pipes ⁷⁶ and their sizes, the number of hydrants and their capacity, were fixed by said ordinance, and it was provided that the pumping-station, pumps, and distributing system should be built and constructed in strict compliance with the plans and specifications on file in the office of the town clerk.

Section 3 provided that said waterworks should be fully completed on or before May 1, 1902, with a condition as to strikes, etc.

By section 5 it was provided that the water company should furnish and maintain not less than fourteen hydrants, which the town agreed to rent during said period of fifty years, and to pay therefor to said water company, its successors and assigns, an annual hydrant rental of \$1,350, payable in two equal semi-annual installments, fixing the time, and that for all hydrants in excess of fourteen the town agreed to pay \$60 each, payable as the other hydrant rentals. "And to the payment of the said rentals during the whole of the period of fifty years at the times and in the manner hereinbefore specified, the faith and credit of the said town of Waterloo is hereby irrevocably pledged to the said Waterloo Water Company, its successors and assigns. Provided, however, that should the said Waterloo Water Company, its successors and assigns, issue its mortgage bonds as hereafter authorized, so much of the said hydrant rentals as will be required to pay the semi-annual interest on said mortgage bonds and provide a sinking fund for the payment of the principal of said bonds when the same become due, shall be set apart as a special fund by said town of Waterloo, and shall be payable by said town of Waterloo to the Fort Wayne Trust Company, trustee, in trust and confidence on the express trust that said trustee shall pay the same in discharge of the interest and principal of the said bonds, to the holders of said bonds, at the time and place where the interest and

principal of said bonds, by their terms, are made payable, and said hydrant ⁷⁷ rentals shall be applied to the payment of said interest and principal as the same shall become due, and to no other purpose. Said funds shall be held by said trustees inviolate, and they are hereby irrevocably pledged to the payment of the interest and principal of said bonds."

Section 6, omitting the part left out when said section was amended by the board of trustees after this suit was commenced, was as follows: "The hydrant rentals referred to in section 5 of this ordinance shall be payable out of the taxes to be raised by the said town of Waterloo from year to year, and said town of Waterloo shall, and it hereby agrees, annually, during said term of fifty years, to levy and collect a tax upon all taxable property of said town sufficient to pay said hydrant rentals, and it is hereby ordered by said board of trustees of said town that such tax shall be levied and collected from year to year in the manner prescribed by law, and when levied and collected is hereby irrevocably pledged to the payment of said rentals, . . . provided, however, that said town shall not be obliged to levy or collect any special tax in excess of the amount now authorized by law for that purpose, unless the said town shall be authorized to levy and collect a greater tax. And the town further agrees, in case such special tax shall be insufficient to pay the hydrant rentals from year to year as herein agreed, that it will levy and collect with its general taxes, sufficient sums of money to pay all of the said hydrant rentals as aforesaid; but it is nevertheless provided that no understanding or obligation of the town herein shall create any debt of the town within the meaning of the term as used in the provision of the constitution which limits the power of towns to incur indebtedness, and if for any cause there shall not be sufficient moneys in the treasury of the town applicable to the payment of the said rentals, to pay the same as they become payable according to the foregoing provisions, then the payment thereof shall be postponed until there shall be such moneys in the treasury ⁷⁸ of the town; and the true meaning and intent of this section is that the said town of Waterloo shall be fully bound to levy and collect the taxes as aforesaid, and that said town shall faithfully apply all such taxes and all other money in its treasury which may lawfully be so applied to the payment of the hydrant rentals at the times aforesaid."

By section 7 the Waterloo Water Company was authorized to issue the first mortgage bonds of said company to an amount

not to exceed \$17,500, bearing interest at the rate of six per cent per annum, payable semi-annually, and to secure said bonds by a first mortgage on said plant and all its property and franchises, including all contracts entered into by it, including the grant of said town; this authority being given to enable said water company "to provide a portion of the funds wherewith to construct, erect, equip, and complete said waterworks plant and system."

Other sections provided a maximum rate for water furnished to private consumers, authorized the water company to make and enforce reasonable rules, and appoint a superintendent to represent the town in the construction of said system, and provided that the water company should not be liable for the salary paid or agreed to be paid to such superintendent.

Ordinance No. 6 authorized the president of the board of trustees of said town to subscribe for two hundred and twenty shares of the capital stock of said Waterloo Water Company, at the par value of \$5,500, and to represent the town at any meetings of the stockholders of said water company, and to vote said stock at such meetings. Said ordinance provided for the issuance of eleven bonds of said town for \$500 each, dated November, 1902, payable twenty years after date, and bearing interest at the rate of six per cent per annum, payable semi-annually, the proceeds of said bonds to be applied only to the payment of the stock so subscribed in said water company.

⁷⁰ Ordinance No. 7 was in regard to the electric light plant, and, so far as the parts thereof necessary to the decision of this case are concerned, was substantially the same as ordinance No. 5, except that the franchise was granted for ten years only, and the contract for light was for the same period. Twenty-three arc lights were to be furnished, for which the town was to pay an annual light rental of \$570, payable in semi-annual installments, fixing the time of payment of each installment. For each light in excess of twenty-three, the town was to pay an annual rental of \$60, payable in semi-annual installments as the other light rentals were to be paid. The same person was named as superintendent as in ordinance No. 5. It was provided in each of said ordinances, No. 5 and No. 7, that the same should "be in force and take effect thirty days after its passage, provided the Waterloo Water Company should have filed its written acceptance with the town clerk within twenty days from such passage." No election was held to determine the question of the establishment of said waterworks by said

town. In fixing the amount of light and hydrant rentals to be paid by said town, no chance for competition was offered, but the same were determined by the said president of the Olds Construction Company and the board of trustees of said town by estimating the amount of money that would be realized by a levy of thirty-five cents on the \$100 valuation for water purposes, and a levy of fifteen cents on each \$100 valuation for light purposes, and for the money so realized the town was to be provided with fourteen hydrants and twenty-three street lights.

After the passage of said ordinance No. 6, the president of the board of trustees of said town, for said town, subscribed for two hundred and twenty shares of the capital stock of said water company, as directed by said ordinance. None of the capital stock of said water company has been subscribed for except the three shares taken by said three incorporators, and the two hundred and twenty shares taken by said town, nor is it the intention ^{so} of said incorporators that any more stock shall be subscribed for; and within twenty days after the passage of said ordinances No. 5 and No. 7, on October 7, 1901, said Waterloo Water Company filed in the office of the clerk of said town a written acceptance thereof, and said water company also accepted said specifications for the waterworks and electric light plant, and directed its president and secretary to enter into a contract with the Olds Construction Company for the performance of said work at its bid of \$21,795. Said water company also, on October 1, 1902, ordered an issue of thirty-five bonds of \$500 each, amounting to \$17,500, as authorized by said ordinances No. 5 and No. 7, dated November 1, 1901, and falling due in from one to fifteen years with interest from date at six per cent per annum, payable semi-annually, and the execution of a mortgage on said water and light plant, franchises, and contracts with said town to secure said bonds. On February 1, 1902, said town secured a written option on a lot to which to change the location of said water and light plant from the town-hall site, which contract of option was assigned by said town to said water company on February 14, 1902.

On February 11, 1902, the board of trustees of said town passed two ordinances amending said ordinances No. 5 and No. 7, by which the franchise for waterworks and the period for which the town was to rent hydrants were changed from fifty years to twenty-five years, and the number of hydrants to be rented by the town was changed from fourteen to fifteen, and

it was provided that "said rentals are to be paid only in case a sufficient and wholesome supply of water is furnished by said Waterloo Water Company, its successors and assigns, to said town and its citizens through the hydrants herein referred to and through such other hydrants as may be placed from time to time." By said ordinances amending said ordinances No. 5 and No. 7, the amount for which the Waterloo Water Company was authorized ^{§1} to issue its bonds and secure the same by mortgage was increased from \$17,500 to \$20,000. Section 2 of ordinance No. 5, which granted the water company the right to occupy the town-hall site to erect its plant, was so amended by said ordinances passed February 11, 1902, that such right was not granted. The provisions of said ordinances No. 5 and No. 7 in regard to the purchase of said plant by said town were amended so as to provide that "so much of the hydrant rentals theretofore paid by said town as may have been applied to the payment of the principal due on the bonds issued by the Waterloo Water Company shall be applied as a credit on the amount of the purchase price." It was provided in each of said amendatory ordinances passed on February 11, 1902, that the same should "be in force and go into effect thirty days after its passage, provided the Waterloo Water Company shall have filed its written acceptance thereof with the town clerk within ten days from its passage." The Waterloo Water Company filed its written acceptance of said ordinances with the town clerk of said town on March 11, 1902. On February 26, 1902, said water company notified the board of trustees of said town that, by reason of the change in the location of the water and light station, there would be an additional expense of \$2,325. It will require the sum of \$34,040 to pay the principal and interest of the bonds for \$20,000, if issued by said water company as authorized by section 7 of the amendatory ordinance of February 7, 1902, and paid as they fall due.

At the commencement of this action, on October 19, 1901, no written contract had been made between the Waterloo Water Company and the Olds Construction Company for the construction of the water and light plant, all proceedings under said ordinances No. 5 and No. 7 having been suspended upon the commencement of this suit. At the time of the trial of this cause, in March, 1902, the bonds of the town authorized by ordinance 6 had not been ^{§2} issued, nor had the bonds of said water company authorized by said ordinances No. 5 and No. 7, and the amendments thereto, been issued by said water com-

pany. The purpose of the board of trustees of said town in granting the franchise to said Waterloo Water Company by said ordinances, and taking stock in said company, was to procure a supply of water and light for public and private use in said town.

It was found that "in adopting the several ordinances heretofore found, and in taking the other steps in relation to the establishment of the water and light system in said town, there was no fraud on the part of any of the parties to the action." The court stated as a conclusion of law "that the plaintiffs in this case are not entitled to an injunction and the relief asked." There being no finding that said ordinances No. 5 and No. 7, and the ordinances amending the same, each of which was to take effect thirty days after its passage, on certain conditions mentioned therein, were not published as required by the sixteenth subdivision of section 4357 of Burns' Revised Statutes of 1901, Acts of 1879, page 201 (*Meyer v. Town of Boonville* (1903), 162 Ind. 165, 70 N. E. 146), we assume that publication was made thereof as required by said subdivision 16.

Article 13 of the constitution of this state provides that "No political or municipal corporation in this state shall ever be indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void." This article amending the constitution was "agreed to" by the legislatures of 1877 and 1879, and was adopted by the people in March, 1881. It was suggested in *City of Valparaiso v. Gardner* (1884), 97 Ind. 1, 9, 10, 49 Am. Rep. 416, and in *City of Laporte* ⁸³ *v. Gamewell etc. Tel. Co.* (1896), 146 Ind. 466, 469, 58 Am. St. Rep. 359, 45 N. E. 588, 35 L. R. A. 686, that said article 13, *supra*, was taken from the constitution of Iowa, but an examination of the constitutions of the states of Illinois, Wisconsin, West Virginia, and Missouri shows that they also contained, in legal effect, and almost in words, the same provisions as said article 13, prior to 1881, when said amendment of our constitution was adopted by the people, and also before 1877, when the same was first proposed and agreed to by the legislature. Under such circumstances, we cannot assume that said article 13 was taken from the constitution of Iowa, in order to apply the rule that when a constitution or

statute, or part thereof, is taken from another state it will be deemed to have the meaning given to it by the courts of that state before it was adopted. For aught that appears, said article 13 may have been taken from the constitution of any of the other states named.

It is contended by appellants: 1. That the special findings show that the transaction, as a whole, was a scheme to evade said article 13 of the constitution by means of a dummy corporation: *Earles v. Wells* (1896), 94 Wis. 285, 59 Am. St. Rep. 885, 68 N. W. 964; *Hebard v. Ashland County* (1882), 55 Wis. 145, 12 N. W. 437; *Reynolds v. City of Waterville* (1898), 92 Me. 292, 42 Atl. 553; *Brown v. City of Corry* (1896), 175 Pa. St. 528, 34 Atl. 854; *Nelson v. City of Chicago* (1902), 196 Ill. 390, 63 N. E. 738; *City of Joliet v. Alexander* (1902), 194 Ill. 457, 62 N. E. 861; *Culbertson v. City of Fulton* (1888), 127 Ill. 30, 18 N. E. 781; *City of Springfield v. Edwards* (1877), 84 Ill. 626; *Hall v. City of Cedar Rapids* (1901), 115 Iowa, 199, 88 N. W. 448; *Windsor v. City of Des Moines* (1900), 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476; *Orvis v. Board, etc.* (1893), 88 Iowa, 674, 45 Am. St. Rep. 252, 56 N. W. 294; *Ironwood Water Works Co. v. City of Ironwood* (1894), 99 Mich. 454, 58 N. W. 371; *Mayor etc. v. Gill* (1869, 31 Md. 375; *Newell v. People* ⁸⁴ (1852), 7 N. Y. 9, 78, 86; *State v. City of Helena* (1900), 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99, 55 L. R. A. 336; *Browne v. City of Boston* (1901), 179 Mass. 321, 60 N. E. 934; *City of Ottumwa v. City Water Supply Co.* (1902), 119 Fed. 315, and note, pp. 325-330, 56 C. C. A. 219, 59 L. R. A. 604; note to *Beard v. City of Hopkinsville* (1892), 44 Am. St. Rep. 233. 2. That there was no statute which authorized a town to take stock in a water and light plant, but that the statute on that subject had reference only to waterworks companies regularly and duly incorporated for that purpose and no other.

Incorporated towns have authority to contract for water for public use, and for the lighting of the streets, alleys, and other public places in said towns with electric light: *Burns' Rev. Stats.* 1901, sec. 4393a (Acts 1897, p. 263); sec. 4301 (Acts 1883, p. 85); secs. 4443r-4443b1 (Acts 1899, p. 216); *Town of Gosport v. Pritchard* (1900), 156 Ind. 400, 59 N. E. 1058, and cases cited.

It is settled in this state that if a town contracts for water or light, or other things which pertain to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the

aggregate sum of all such payments, within the meaning of said article 13 of the constitution, because the debt for each year or month does not come into existence until it is earned. But if the indebtedness of the town already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness as it comes into existence, including the other expenses for which the town is liable, an indebtedness is created in violation of said article 13 of the constitution: *City of South Bend v. Reynolds* (1900), 155 Ind. 70, 72, 73, 57 N. E. 706, 49 L. R. A. 795, and authorities cited; *Board v. Gardner* (1900), 155 Ind. 165, 170, 57 N. E. 908, and cases cited; *Lake County v. Rollins* (1889), 130 U. S. 662, 9 Sup. Ct. Rep. 651, 32 L. ed. 1060; *Doon Tp. v. Cummins* ⁸⁵ (1892), 142 U. S. 366, 12 Sup. Ct. Rep. 220, 35 L. ed. 1044; *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781; *Earles v. Wells*, 94 Wis. 285, 296, 297, 59 Am. St. Rep. 886, 68 N. W. 964. The effect of the constitutional inhibition is to require a municipal corporation indebted to the limit fixed by the constitution to carry on its corporate operations while so indebted upon a cash basis, and not upon credit, to any extent or for any purpose: *City of Laporte v. Gamewell etc. Tel. Co.* (1896), 146 Ind. 466, 470, 471, 58 Am. St. Rep. 359, 45 N. E. 588, 35 L. R. A. 686; *Earles v. Wells*, 94 Wis. 285, 296, 297, 59 Am. St. Rep. 886, 68 N. W. 964.

While the expense of water and light for public use in a town or city is an ordinary and necessary expense, the construction of a waterworks or electric light plant by such town or city is not in any sense an ordinary and necessary expense, but an extraordinary one. There is a clear and plain distinction between a contract for water and light for public use and one for the construction of a water and light plant to furnish the same. The first is an ordinary and necessary expense, while the latter involves municipal ownership of the water and light plant, the means of furnishing said water and light, and is an extraordinary expense: *City of South Bend v. Reynolds*, 155 Ind. 73, 57 N. E. 706, 49 L. R. A. 795; *Brown v. City of Corry*, 175 Pa. St. 528, 536, 34 Atl. 854; *Scott v. City of Davenport* (1872), 34 Iowa, 208; *Grant v. City of Davenport* (1873), 36 Iowa, 396, 401-403.

It has been correctly held that municipal corporations cannot evade restrictions upon their power to become indebted by issuing their bonds, payable only out of a fund raised by a special tax authorized, levied and collected for that purpose (provided the same are not for special benefits, as in the cases of *Board* etc.

v. Harrell (1897), 147 Ind. 500, 46 N. E. 124, and cases cited, and Quill v. City of Indianapolis (1890), 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681), or payable only out of the rentals or income of a water or light plant or other property owned by such municipal corporation, or by buying property subject to liens, although they do not assume or agree, in terms, to pay said liens, or by providing ⁸⁶ that such liens shall be paid only out of a special fund raised by taxation for that purpose, or only out of the income of such property: City of Joliet v. Alexander, 194 Ill. 457, 62 N. E. 861; Culbertson v. City of Fulton, 127 Ill. 30, 18 N. E. 781; City of Ottumwa v. City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604, and cases cited; Windsor v. City of Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476 and cases cited; Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448, and cases cited; Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553; Browne v. City of Boston, 179 Mass. 321, 60 N. E. 934, and cases cited; Ironwood Water Works Co. v. City of Ironwood, 99 Mich. 454, 58 N. W. 371; Mayor etc. v. Gill, 31 Md. 375.

If the plant shall be paid for under the arrangements shown in the special finding, it will cost the town, exclusive of interest, at least the contract price, \$21,795, and the additional cost on account of the change of the water and light station, \$2,325, making a total of \$24,120. The town has not agreed to pay the bonded indebtedness of said company, but, by the ordinances set out in the special finding, it assumed to bind the town to pay \$1,350 per annum for twenty-five years as water rentals for fifteen hydrants, being \$90 a year for each hydrant, and \$570 a year for ten years for light rentals, a total of \$1,920 per annum during the continuance of the light rental. This amount must be paid each year to the trustee for the bondholders, to be applied in payment of the principal and interest of the bonds to be issued by the water company. Not only were the special taxes authorized by law for water and light purposes when said ordinances were passed and the town's power to levy the same pledged to the payment of said water and light rentals, but the general taxes of said town, and its power to levy the same, were also pledged for that purpose, with a proviso that no undertaking or obligation of the town contained in said ordinances should create any debt of the town within the meaning of the constitution. If said ordinances created any indebtedness against the town in excess of the constitutional limit, the same was void to the extent of such excess without regard to said proviso.

⁸⁷ It is settled law in this state that taxes general or special cannot be anticipated or pledged by a municipality, if at all, beyond the limit it may become indebted, unless the tax has been actually levied and the warrant is drawn payable out of that fund, and be such in effect as to discharge the municipality from all liability: *City of Laporte v. Gamewell etc. Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588, 35 L. R. A. 686, and cases cited; *City of Joliet v. Alexander*, 194 Ill. 457, 62 N. E. 861.

If the Olds Construction Company, or any other corporation in which the town was not a stockholder, had built said water and light plant ready for operation, and given a mortgage or trust deed thereon to secure an issue of bonds for \$20,000, and then sold and conveyed the same to said town, subject to said mortgage or trust deed, in consideration of the bonds of said town for \$5,500, and the town's providing by ordinance, as in this case, for the water and light rentals, and for the levying and collecting of taxes for water and light purposes, to pay the same, and the application thereof to the discharge of said mortgage lien of \$20,000 on said water and light plant, and the interest thereon, even if it was expressly agreed that in no event should the town be liable for said bonds, or any part thereof, secured by said mortgage or trust deed, it is clear that said town of Waterloo would, under the authorities cited in this opinion, have become indebted by such an arrangement within the meaning of article 13 of the constitution of this state. This is put upon the ground that the town would have to pay said bonds, or submit to have its property taken from it by foreclosure proceedings, and thus lose its property and all the money it had paid thereon. The town must pay the mortgage, or lose all the money paid, and the benefits to be derived from the purchase. "It is expected and understood that it will pay it and the interest on it": *Ironwood Water Works Co. v. City of Ironwood*, 99 Mich. 454, 58 N. W. 371, and cases cited; *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, and cases cited. There is no substantial difference between such a ⁸⁸ transaction and the one shown by this special finding. The special finding shows that the town could not contract for the construction of said water and light plant without becoming indebted beyond the limit fixed by said article 13 of the constitution. The notice of letting the contract for the construction of the water and light plant was given by the town, and the proposal of the Olds Construction Company to build the same was accepted by the town before the

articles of association of the Waterloo Water Company were filed in the office as required by law, and before any of the stock was subscribed.

The capital stock of said Waterloo Water Company was \$25,000, and only \$5,575 thereof was ever to be subscribed, \$5,500 of which, or two hundred shares, was to be subscribed by the town, and \$75, or three shares, by the officers and attorney of the Olds Construction Company, the successful bidder for the contract to construct the water and light plant. Under said arrangement the town was to own substantially all the stock to be subscribed, while the statute only by implication, if at all, authorized a town which had become a part stockholder by subscribing to the capital stock to sell its bonds to pay for the same. There were three stockholders besides the town, each owning one share of stock, but they were necessary in order that there might be three directors, under the statute which provides that such corporations shall be managed by a board of not less than three directors, who shall be stockholders. If the town had power to take stock in said corporation and become a stockholder therein, it practically owned said Waterloo Water Company, the corporation which obtained the franchise to construct and own the water and light plant, subject to the bonded debt of \$20,000 authorized by said ordinances when said bonds were issued and sold. To obtain this right the town will be compelled to raise \$5,500 by a sale of its bonds. It is owned and controlled by the town, and the operation and management of said water and light plant are ^{so} to be under the supervision of the board of trustees of said town, and its engineer or agent, appointed for that purpose. Under the arrangement shown by the special finding the town would be the real owner of the water and light plant when constructed. The Waterloo Water Company is merely a dummy corporation, owned by the town, but making contracts and incurring liabilities which it is admitted the town cannot make or incur in its own name without violating the provisions of the constitution restricting its power to become indebted. In other words, the town is attempting to do by a corporation practically owned by it what it has no power to do, and is prohibited from doing. Said arrangement is a palpable violation of said article 13 of the constitution, for what a town cannot do directly it cannot do indirectly through a dummy corporation controlled and practically owned by it. The constitution cannot be evaded in this manner. In *State v. Forsythe* (1897), 147 Ind. 466, 472, 473, 44 N. E. 593, 33 L. R. A. 221, the court quoted with ap-

proval the following from Maxwell on Interpretation of Statutes, 133, 134: "It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined. In *fraudem legis facit, qui, salvis verbis legis, sententiam ejus circumvenit*; and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. When the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. When the thing done is substantially that which was prohibited, it falls within the act, simply because, according to the true construction of the statute, it ^{is} the thing thereby prohibited. Whenever courts see such attempts at concealment 'they brush away the cob-web varnish,' and show the transaction in its true light. They see things as ordinary men do, and see through them. Whatever might be the form or color of the transaction, the law looks to the substance of it. In all such cases it is, in truth, rather the particular transaction than the statute which is the subject of construction; and if it is found to be in substance within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked": See, also, *Webb v. John Hancock etc. Ins. Co.* (1904), 162 Ind. 616, 69 N. E. 1006, 1011, and cases cited; *Government etc. Inst. v. Denny* (1900), 154 Ind. 261, 266, 55 N. E. 757, and authorities cited.

It is found that there was no fraud on the part of any of the parties to the action in adopting said ordinances, or in taking the other steps in relation to the establishment of the water and light system in said town. It is not material whether or not there was any fraud on the part of anyone, nor does the necessity for said water and light plant make any difference, if by said arrangement the town became indebted within the meaning of our constitution. The language of article 13 of the constitution is plain and simple, and its meaning is unmistakable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited, no matter what the necessity, pretext or circumstances may be, except those provided for in said article, or the form which the indebtedness is made to

assume. It binds the courts, curbs the power of the legislature, the officials, and the people themselves, and was intended to protect the taxpayers by confining the indebtedness of a municipal corporation within a prescribed limit.

We will now consider appellants' second proposition—that said town was not authorized to become a part stockholder in said corporation. It is settled law that incorporated towns and cities have only the following powers: ⁹¹ 1. Those granted in express words; 2. Those necessarily implied or incident to the powers expressly granted; and 3. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. And doubtful claims of power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation: *Muncie Nat. Gas Co. v. City of Muncie* (1903), 160 Ind. 97, 100, 66 N. E. 436, 60 L. R. A. 822, and authorities cited; *Pittsburgh etc. R. Co. v. Town of Crown Point* (1896), 146 Ind. 421, 422, 45 N. E. 587, 35 L. R. A. 684, and authorities cited; *Bogue v. Bennett* (1901), 156 Ind. 478, 480, 481, 83 Am. St. Rep. 212, 60 N. E. 143; *Walker v. Towle* (1901), 156 Ind. 639, 641, 59 N. E. 20, 53 L. R. A. 749; *Scott v. City of Laporte* (1904), 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *Black on Interpretation of Laws*, 317. It is evident that a town or city has no power in this jurisdiction to become a part stockholder in a waterworks or other corporation, or to borrow money by issuing bonds or otherwise to pay for such stock, unless express authority to do so is given by some statute: *City of Aurora v. West* (1864), 22 Ind. 88, 85 Am. Dec. 413; *Mayor etc. v. Wetumpka Wharf Co.* (1879), 63 Ala. 611; *Pitzman v. Village of Freeburg* (1879), 92 Ill. 111; *Black on Interpretation of Laws*, 318; *Dillon on Municipal Corporations*, 4th ed., sec. 161; 20 Am. & Eng. Ency. of Law, 2d ed., 1144. Such statutes are strictly construed in limitation of such powers: 20 Am. & Eng. Ency. of Law, 2d ed., 1098 (3), 1099 (c); *Demaree v. Johnson* (1898), 150 Ind. 419, 423, 49 N. E. 1062, 50 N. E. 376; *Garrigus v. Board etc.* (1872), 39 Ind. 66, 77; *Couchman v. Prather* (1904), 162 Ind. 250, 70 N. E. 240; *Miles v. Ray* (1884), 100 Ind. 166, 169, and cases cited; *Scott v. City of Laporte* (1894), 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *McManus v. Duluth etc. R. Co.* (1892), 51 Minn. 30, 52 N. W. 980; *Pennsylvania R. Co. v. Canal Commissioners* (1852), 21 Pa. St. 9, 22; *Winchester etc. Road Co. v. Clarke County Court* (1860), 60 Ky. 140; *Harding v. Rockford etc. R. Co.* (1872), 65 Ill. 90; *Pitzman v. Village of Freeburg*, 92 Ill. 111. This power is claimed for

towns ⁹² under section 3614 of Burns' Revised Statutes of 1901, Acts of 1895, page 140, the same being an amendment of the act of 1893 (Acts 1893, p. 184). If said act of 1895 empowers a town to become a part stockholder in a waterworks company authorized by it to construct waterworks for furnishing water to said town, it is by implication, because said act does not in express terms authorize a town to become a part stockholder in such corporation or association. Can this be done? *Pitzman v. Village of Freeburg*, 92 Ill. 111, and authorities above cited. A city of the general class, however, was authorized by subdivision 26 of section 3541 of Burns' Revised Statutes of 1901, enacted in 1867, to become a part stockholder in a corporation or association authorized to construct waterworks in said city. In 1893 the legislature passed an act authorizing cities taking stock in waterworks corporations under subdivision 26 of section 3541, *supra*, to issue and sell bonds to pay for such stock: Acts 1893, p. 184. The title of said act of 1893 was as follows: "An act to authorize the common council of any city to issue, negotiate and sell the bonds of such city, to raise money to pay for stock subscribed to any incorporated waterworks company or association, in which said city may become a part stockholder, and declaring an emergency." Without amending the title of the act of 1893, the act of 1895 purports to amend said act of 1893 by extending the provisions thereof to "the boards of trustees of incorporated towns." It is clear that the title of said act of 1893 was not sufficient to embrace the provision in regard to the boards of trustees of incorporated towns contained in said amendatory act of 1895: *State v. Bowers* (1860), 14 Ind. 195, *Mewherter v. Price* (1858), 11 Ind. 199; *State v. Commercial Ins. Co.* (1902), 158 Ind. 680, 684-687, 64 N. E. 466; *Dixon v. Poe* (1902), 159 Ind. 492, 495, 95 Am. St. Rep. 309, 65 N. E. 518, 60 L. R. A. 308. The title of the act of 1893 is set forth in full in the title of said act of 1895, and is followed by the words "so as to extend the provisions thereof to incorporated ⁹³ towns, and declaring an emergency." Can the subject of an amendatory act be enlarged in this manner to embrace a matter not covered by the title of the act amended? *Walsh v. State* (1895), 142 Ind. 357, 361, 362, 41 N. E. 65, 33 L. R. A. 392; *State v. Commercial Ins. Co.*, 158 Ind. 680, 686, 64 N. E. 466; *State v. Bowers*, 14 Ind. 195; *Dyker etc. Improvement Co. v. Cook* (1896), 3 App. Div. 164, 38 N. Y. Supp. 222. The view we take of this case renders unnecessary the determination of this question, as well as the question whether or not by implication

towns can be authorized to subscribe to the capital stock of waterworks companies or associations, and become part stockholders in such companies or associations.

Conceding, without deciding, that the town of Waterloo was authorized by said act of 1895 (Burns' Rev. Stats. 1901, sec. 3614) to take stock in the kind of corporation mentioned therein, the same as cities, did it have the power to become a stockholder in the Waterloo Water Company? That company, as shown by its articles of association, was incorporated to own and operate a water and light plant and furnish water and light for public and private use in said town. It is insisted by appellant that there is no law in this state authorizing "the organization of a corporation for the purpose of furnishing both water and light to a town for public and private use"; citing *Williams v. Citizens' Enterprise Co.* (1900), 25 Ind. App. 351, 57 N. E. 581. We need not, and do not, decide this question, for the reason that even if a corporation may be organized for both of said purposes, section 3614, *supra*, does not purport to authorize towns to issue, negotiate and sell their bonds to pay for stock in such a corporation. If said section empowers a town to take stock in a corporation and issue, negotiate and sell its bonds to pay therefor, it is clear, under the rule of strict construction already stated, that the corporation must be a waterworks corporation—one which has been granted a franchise to construct a waterworks plant, and furnish water to said town, one organized for that purpose and no other. The Waterloo Water Company⁹⁴ having been organized for the purpose of constructing and operating both a water and light plant to furnish water and light to said town, it follows that the town of Waterloo had no power to take stock therein, or to issue, negotiate and sell its bonds to pay for the same. It follows that the court erred in its conclusion of law.

Other questions are argued in the briefs of counsel, but the conclusion we have reached renders their determination unnecessary.

Judgment reversed, with instructions to restate the conclusions of law in conformity with this opinion, and to render final judgment against appellees, the defendants in the court below, accordingly.

Municipal Indebtedness beyond the limit fixed by the constitution is discussed in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243; and the subsequent cases of *Keller v. Scranton*, 200 Pa. St. 130, 86 Am. St. Rep. 708; *Addyston Pipe etc. Co. v.*

Corry, 197 Pa. St. 41, 80 Am. St. Rep. 812; National Life Ins. Co. v. Mead, 13 S. Dak. 37, 79 Am. St. Rep. 876; Klamath Falls v. Sachs, 35 Or. 325, 76 Am. St. Rep. 501. That persons dealing with municipal corporations must take notice of the constitutional limit on their power to incur indebtedness, see Smith v. Broderick, 107 Cal. 644, 48 Am. St. Rep. 167; State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453. As to the power of a city to incur an indebtedness for water or light, see Beard v. Hopkinsville, 95 Ky. 239, 44 Am. St. Rep. 222; Saleno v. Neosho, 127 Mo. 627, 48 Am. St. Rep. 653; State v. Helena, 24 Mont. 521, 81 Am. St. Rep. 453. The necessity of a city for an electric light plant is said to be no defense for the construction thereof by the city, if such act increases its indebtedness beyond the constitutional limit: Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280.

MORDHURST v. FORT WAYNE AND SOUTHWESTERN TRACTION COMPANY.

[163 Ind. 268, 71 N. E. 642.]

INJUNCTION—Allegation of Intent, When Unavailing.—It will not be presumed that a railroad company will violate its contract with a municipality, and an allegation in the complaint in a suit for an injunction that it intends to do so, in advance of any act of the company constituting such a violation, cannot prevail against the presumption of good faith and fair dealing. (pp. 225, 226.)

PUBLIC STREETS—Purposes for Which Dedicated.—The dedication of a public street must be presumed to have been made not for such purposes and usages as were known to the land owner and statute at the time of the dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate. The convenience and advantage of all the inhabitants of the city and of the public at large must be regarded as the objects contemplated when the street was laid out or opened. (p. 231.)

PUBLIC STREETS, Additional Servitudes in.—An Interurban Street Passenger Railway, with the necessary turnouts, switches, feed wires and poles in and along a public street, though authorized to transport light express matter, passengers, baggage and United States mails, does not impose any additional servitude on the street, entitling abutting property owners to compensation. (pp. 231, 232.)

J. M. Barrett and S. L. Morris, for the appellant.

Walter Olds and N. D. Doughman, for the appellee.

269 DOWLING, J. This suit was brought by the appellant against the appellee to enjoin the latter from constructing and operating an interurban railway over that part of Fulton street, in the city of Fort Wayne, upon which a lot owned by appellant abuts, no compensation for such appropriation and use of appellant's interest in the land so appropriated having been assessed

and tendered. A demurrer to the complaint for want of sufficient facts was sustained, and, upon the refusal of the plaintiff below to plead further, judgment was rendered upon the demurrer. From this judgment the plaintiff appeals, and he assigns the ruling on the demurrer for error.

Greatly condensed, the material facts stated in the complaint are these: The plaintiff is, and for several years has been, the owner in fee simple of lot No. 6, in ²⁷⁰ block 23, in Ewing's addition to the city of Fort Wayne. On said lot there are four large and expensive houses fronting on Fulton street, used as residences. Said lot No. 6 abuts upon the east line of said street for a distance of one hundred and fifty feet, and the plaintiff, as such abutting owner, has title to all that part of said street opposite his said lot to the center line of said street, subject only to the public easement therein for the usual and ordinary purpose of a street. The defendant is an interurban railway company, organized under the laws of this state for the purpose of constructing and operating an interurban railroad system in said city of Fort Wayne and its vicinity, and from thence to the cities of Huntington, Wabash, and such other cities and counties in this state as the defendant may select, and to connect at such cities and counties with other railroads in this and other states. Said line is already constructed from the city of Fort Wayne to the city of Huntington, and is being operated by the defendant. The extension of said line from the city of Huntington to the city of Wabash is now being built, and is nearly completed, and the defendant intends to extend its railroad to other cities and counties in this state. By the law of this state the defendant is authorized to transport persons and all kinds of property on its cars along the streets of the cities in which its railroad is constructed, by such force and power as such cities may permit to receive tolls and compensation for such service, and, if necessary, to acquire real estate for the use of such company by appropriation and condemnation. The city of Fort Wayne by its board of public works, on December 13, 1900, granted to George Townsend, William S. Reed, and Charles C. Miller, and to their successors and assigns, permission to lay a single track for an interurban street passenger railway line, with the right to haul express matter, mail, and passenger baggage in connection therewith, to be operated by electricity, or other improved power, to be approved by said board of public ²⁷¹ works, with all proper and necessary turnouts, wire, poles, etc., in and upon said Fulton street, and other streets of said city of Fort Wayne, and over

that part of said Fulton street on which plaintiff's lot abuts. Said railway is to be constructed from the city of Fort Wayne to the city of Huntington, a distance of twenty-five miles. By the terms of the said grant from the city of Fort Wayne the motive power is at all times to be ample and of the approved kind. The cars are to be of the best pattern; they are to be kept clean, well ventilated, seated, heated and lighted; they are to be kept painted and decorated outside and inside, so as to present an attractive appearance; they are to be designated as express and passenger cars; the express-cars are to be used exclusively for light express matter, passengers' baggage, and United States mail matter; the passenger cars are to be used for hauling passengers, baggage, light express matter, and United States mail combined. Unless expressly authorized by the board of public works no train of more than one car shall be run over said line, but said board, upon the petition of the said company, may permit two cars to be run. The said company is required to permit other interurban or suburban companies, empowered by the common council or board of public works of the city of Fort Wayne, to use the streets of that city for the transportation of passengers, express, and United States mail, to use its tracks, etc. The contract between the board of public works of said city of Fort Wayne and the said Townsend, Reed and Miller, was assigned to the defendant, but such assignment was not reported to or approved by said board. The defendant is claiming that it is not prohibited by its agreement with the city, nor by any ordinance of said city, from carrying freight or any kind of property on its railroad through said streets. Plaintiff has never consented to the use or appropriation of said Fulton street in front of his premises by said defendant. No attempt has been made to obtain his consent to such ²⁷² appropriation and use. No condemnation proceedings have been taken by the defendant to acquire any rights in said street, and no damages have been tendered to the plaintiff for such appropriation of said street in front of his said lot. The defendant threatens to enter upon the plaintiff's premises on said street, and to construct its said railroad, to lay down T rails, such as are used by steam railroads, to erect poles, string wires, etc., and to maintain the same on said street and on plaintiff's said premises. Said railroad will not facilitate or aid the usual traffic on said street, but is intended to and will gather up a large amount of heavy freight and traffic from different parts of the country in cars constructed and intended only to

carry such freight, which will be carried by the defendant along said Fulton street, and over plaintiff's said premises, in heavy cars and trains, at all hours of the day and night, which, in the absence of said railroad, would never be carried along said street, and said defendant will thereby prevent and destroy the usual and ordinary travel and traffic on said street. The construction and operation of said railroad by the defendant will create great and unusual noises and dust, which will be carried by the winds into plaintiff's said residences; will shake and jar said dwelling-houses so as to make them unfit for the purposes for which they were designed; will seriously impede and endanger ingress to and egress from plaintiff's said premises, and diminish their value to the extent of ten thousand dollars. The appropriation and use of the street by the defendant will be a continual nuisance, and will damage said premises as aforesaid. The complaint concludes with a prayer that the defendant be enjoined from excavating said street, constructing a railroad thereon, and from operating and using the same for the transportation of freight, merchandise, express, or mail matter on the cars of the defendant along said Fulton street over plaintiff's premises, and for damages in the sum of ten thousand dollars.

²⁷⁸ The board of public works of the city of Fort Wayne was empowered by the statute under which that city was incorporated to prescribe the terms and conditions upon which any railroad company should use the streets of that city for the construction and operation of its railroad: Burns' Rev. Stats. 1901, sec. 4117, Acts 1893, p. 202, sec. 63, amended by Acts 1899, p. 138; Dillon on Municipal Corporations, 4th ed., sec. 706. Such board did enter into a contract with the defendant below, and the rights, powers, and duties of the defendant in the construction and operation of its railroad on and through the streets of the city were defined and fixed by that agreement. It will not be presumed that the railroad company will violate its contract, and an allegation of the complaint that it intends to do so, in advance of any act of the company constituting such violation, cannot prevail against the presumption of good faith and fair dealing. "The burden is on the appellant to rebut this presumption by bringing forward countervailing facts, not by pleading bare conclusions or recitals. Facts are requisite to constitute a cause of action, and they are wanting in this instance": *Lostutter v. City of Aurora* (1890), 126 Ind. 436, 439, 46 N. E. 184, 12 L. R. A. 259. See, also, *Aurora etc. R. Co. v. City of Lawrenceburgh* (1877), 56 Ind. 80; *Au-*
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rora etc. R. Co. v. Miller (1877), 56 Ind. 88; State v. Kingan (1875), 51 Ind. 142.

To determine the sufficiency of the grounds upon which the right of the plaintiff rests, we must look to the contract between the city and the railroad company, and not to the allegations of expected violations of that agreement by the company. If the use of the streets by the defendant in the manner and upon the conditions described and set forth in the contract would not create a new and additional burden upon the street, and a deprivation of the plaintiff's beneficial interest therein, then he is not entitled to an injunction against the construction of the railroad. Future ²⁷⁴ breaches of that contract, or violations of its terms by the company, resulting in special damage to the property of the plaintiff, may hereafter entitle him to maintain an action against the company for such injuries, but the mere anticipation of such breaches and injuries cannot authorize the court to enjoin the construction and operation of the railroad. It is important, then, to ascertain from the agreement itself what rights in the use of the streets, and in Fulton street among them, were granted to the railroad company, and upon what conditions the company was authorized to use these streets.

It appears from the complaint that the contract with the city authorized the railroad company to lay and maintain a single track for an interurban street passenger railway line on and along certain streets and avenues of the city, including Fulton street. The kind of rail to be laid was not specified, and a T rail, such as is used by steam and other railroads, may be adopted. The company was also granted the privilege of constructing, erecting, and maintaining, in connection with its said railroad, all necessary turnouts, switches, feed wires, and poles. The road is to be operated by electricity, and the power is at all times to be ample, and of the approved kind. The cars are to be of the best pattern, with all usual conveniences for the comfort of passengers. They are to be painted and decorated on the outside, and are always to be kept in repair and made attractive in appearance. They are to be designated as express and passenger cars. The former are to be used exclusively for hauling light express matter, passenger baggage, and United States mail. The latter are to be used exclusively for the transportation of passengers and baggage, light express matter, and United States mail combined. No train consisting of more than one car is to be run over said railroad except that, upon

petition of the company, the board of public works may authorize the running of a train of two cars.

²⁷⁵ Will the construction and operation of such a railroad in the manner prescribed, and subject to the conditions and requirements we have set out, infringe upon the rights of the plaintiff in Fulton street opposite his property, and will it, if so constructed and operated, deprive him of any beneficial interest in the street to which he is entitled? The question is a very practical one, and is to be determined by the facts of the case, and not upon any mere theory or fiction of law. If constructed and operated in the manner described, in what essential particular will the defendant's railroad differ from an ordinary electric street railroad? Both kinds of roads, when deemed necessary, use the T rail, and their cars are propelled by the same motive power. The carriage of light express matter, passenger baggage, and mail matter upon street-cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied and obstructed by it to no greater extent than it would be by a street-car. If two constitute a train, they will take up no more space and do no more injury than a motor-car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage, and United States mail matter are carried on a car does not affect the property owner, nor injure his property. The transportation of articles of this kind does not create any resemblance between the inter-urban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are caused by either passenger or freight trains on such a railroad.

Trains on steam railroads are drawn by locomotives of enormous size and weight, which constantly emit smoke, sparks, cinders, and steam, and which drop coals of fire from their fire-boxes. Their passenger trains usually consist of an express and baggage car, and from one to many ²⁷⁶ large and heavy passenger coaches. Freight trains, as commonly made up, contain from one to twenty-five or thirty large, roughly constructed cars for the transportation of coal, stone, iron, coal-oil in tanks, lumber, livestock, and other heavy merchandise of every description. Such trains, so propelled, unavoidably fill the atmosphere in their vicinity with dust, smoke, and steam, make much noise when running, stopping and starting, seriously obstruct

the streets and street crossings, and, for considerable periods every day, to a great extent, exclude other travel and traffic from the streets on which they are moved. A fair comparison of the incidents and consequences attending the running of a single interurban electric car carrying passengers and baggage, light express matter, and United States mail matter over the streets of a city, or resulting therefrom, with the real and substantial annoyance, inconvenience, danger, and injury to property attending the operation of passenger and freight trains on steam railroads, will demonstrate that most, if not all, the ills and injuries anticipated from the former are imaginary, or, at least, greatly exaggerated.

The defendant is authorized by its agreement with the city of Fort Wayne to run a single electric car over its tracks in that city, and to carry on such car passengers and the articles specified in the agreement. Upon petition, the use of two cars in a train may be permitted. On the narrow basis of these facts, the plaintiff alleges that the proposed interurban railroad will gather up a large amount of heavy freight and traffic from different parts of the country; that it will use heavy freight-cars and trains at all hours of the day and night; that it will prevent and destroy the ordinary travel and traffic on Fulton street; that it will create great and unusual noises and dust, which will be carried into plaintiff's residences; that it will shake and jar said dwelling-houses, so as to render them unfit for use; and that it will seriously impede and endanger ingress to and ²⁷⁷ egress from the said dwellings. The premises entirely fail to support the conclusions drawn from them.

It will be seen that the plaintiff was not content to rest his case upon the proposition that the defendant could not acquire the right to construct and use the street on which plaintiff's lots abut for the purposes of an interurban street railroad without the consent of the plaintiff, or compensation first assessed and tendered or paid, but he attempts to set forth reasons why such privilege should not be granted by the city or exercised by the defendant. It is apparent that every objection founded upon injury to his property rights which the plaintiff can justly urge against the use by the defendant of Fulton street in front of plaintiff's lots would apply with equal force to the use of that thoroughfare by an electric street railroad constructed and operated wholly within the city limits. But this court has held that such a street railroad is not an additional burden upon the street, and that the owners of abutting real estate are not en-

titled to compensation on account of such appropriation and use: *Eichels v. Evansville St. R. Co.* (1881), 78 Ind. 261, 41 Am. Rep. 561; *Chicago etc. R. Co. v. Whiting etc. St. R. Co.* (1894), 139 Ind. 297, 303, 304, 47 Am. St. Rep. 264, 38 N. E. 604, 26 L. R. A. 337; *Brown & Co. v. Duplessis* (1859), 14 La. Ann. 842; *Nichols v. Ann Arbor etc. St. R. Co.* (1891), 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Newell v. Minneapolis etc. R. Co.* (1886), 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Montgomery v. Santa Ana etc. R. Co.* (1894), 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654; *Rafferty v. Central Traction Co.* (1892), 147 Pa. St. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *People v. Ft. Wayne etc. R. Co.* (1892), 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752.

It is equally well settled on the other hand that a railroad corporation cannot construct a common passenger and freight railroad upon the streets of a city in the absence of a license from the abutting lot owners without compensation ²⁷⁸ first assessed and paid or tendered: *Tate v. Ohio etc. R. Co.* (1856), 7 Ind. 479; *Cox v. Louisville etc. R. Co.* (1874), 48 Ind. 178; *Terre Haute etc. R. Co. v. Rodel* (1883), 89 Ind. 128, 46 Am. Rep. 164; *Inhabitants of Springfield v. Connecticut River R. Co.* (1849), 4 Cush. 63. This distinction does not rest upon a difference in name—one being denominated a street railroad or a passenger railroad, and the other a commercial or freight railroad—nor upon the motive power employed, nor upon the kind of rail used, nor upon the length of the railroad. It results from the nature of the business done by each of the two kinds of railroads, and the physical agencies and manner by which and in which that business is carried on. Those of the one are consistent with the use of the street by the lot owner and the general public, and, if not directly beneficial to the abutting real estate, are not detrimental to it. They relieve the streets from some of the burdens of travel upon it, they facilitate travel between different parts of the city, and they enhance the value of abutting property by increasing the convenience of access to it. The business of the other class of railroads, and the means by which it is necessarily carried on, require the service of entirely dissimilar agencies and methods. Great trains of cars moving along the streets, or standing upon them, are real and serious obstructions to all other uses of the highway. Such trains make a loud noise by day and by night, and disturb the quiet of neighborhoods. Access to abutting property is rendered difficult and dangerous, and the jarring

and shaking of buildings is annoying to the occupants, and often injurious to the structures themselves. If the cars are propelled by steam, then there is the additional inconvenience of smoke, cinders, sparks, the blowing off of steam, the ringing of the engine bell, and the whistling of the locomotive. There are good and substantial reasons why compensation should be paid ²⁷⁹ to the owners of abutting lots when a street in a city is used for such a purpose and in such a manner.

If, then, the injuries or inconveniences sustained by the owners of lots abutting on a street on which an interurban electric railroad is constructed are neither different from those resulting from the construction and operation of an ordinary street electric railroad, no greater in degree, and if the latter is held not to be an additional burden upon the street entitling abutting lot owners to compensation, upon what ground can it be asserted that the proposed interurban railroad is such an additional burden as requires compensation to be assessed and paid or tendered to the owners of abutting lots before the street can be lawfully appropriated and used for the purposes of such railroad? The only basis for a claim for compensation is the circumstance that the interurban railroad is intended for the transportation of persons, baggage, light express matter, and United States mail matter to places outside the city of Fort Wayne, and at greater or less distances therefrom. The reason given in support of this claim is that while the interurban railroad is, to some extent at least, a new and additional servitude, it is of no local benefit to the abutting property, that it does not aid in carrying forward the local travel or assist in the work of transportation for which the street was designed, and that the passengers and goods carried by it would not, in its absence, have been brought upon the street at all. It is contended that this is a use of the street not contemplated by the land owners who laid out or dedicated the highway.

A street platted or otherwise laid out in a city or town of this state is thereby dedicated to the use of the public, and not exclusively to the use of abutting property, nor to the convenience or profit of any or all of the inhabitants of the particular municipality. It forms a part of the great system of highways of the state, and its use for intercommunication ²⁸⁰ with other neighborhoods, towns and cities is one of its most important purposes. In many respects it is governed by the general laws regulating public ways. Discriminations in the terms and conditions on which it could be used in favor of the abutting

lot owners, the residents on the particular street, or the inhabitants of the city, and against nonresidents, could not be tolerated.

The dedication of a street must be presumed to have been made, not for such purposes and usages only as were known to the land owner and platter at the time of such dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate: *Cater v. Northwestern Tel. etc. Co.* (1895), 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310; *Cooley's Constitutional Limitations*, 3d ed., 556; *Elliott on Roads and Streets*, 529. The convenience and advantage of all the inhabitants of the city, and of the public at large, must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interests of the community and the public to the inferior and subordinate claims of the local lot owner and abutter. Such a construction of the law governing the dedication of public streets and the reserved rights of the original land owner and his assigns in the street by unreasonably increasing the cost of rights of way or use would obstruct all progress, and deprive the local community of the benefit to be derived from the advancements of science, invention and discovery. It would isolate the community to some degree at least from surrounding neighborhoods, towns and cities, and subject it to many serious inconveniences and privations. This principle has been recognized by this court, and the question can no longer be considered an open one in this state: *Bogue v. Bennett* (1900), 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143; *Magee v. Overshiner* (1897), 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. 951, 40 L. R. A. 370; ²⁸¹ *Lostutter v. City of Aurora* (1890), 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; *Eichels v. Evansville St. R. Co.* (1881), 78 Ind. 261, 41 Am. Rep. 561; *Coburn v. New Telephone Co.* (1901), 156 Ind. 90, 59 N. E. 324; *Chicago etc. R. Co. v. Whiting etc. St. R. Co.* (1894), 139 Ind. 297, 47 Am. St. Rep. 264, 38 N. E. 604, 26 L. R. A. 337; *Chicago etc. R. Co. v. Hammond etc. R. Co.* (1898), 151 Ind. 577, 46 N. E. 999.

Rapid and cheap transportation of passengers, light express and mail matter between neighboring towns and cities may be quite as necessary and as largely conducive to the general welfare of the places so connected, and their inhabitants as the

like conveniences within the town or city. Where such transportation is furnished by an interurban electric railroad operated under the conditions and restrictions contained in the agreement between the appellee and the city of Fort Wayne, we do not think the construction and operation of such a railroad in such a manner constitutes an additional servitude upon the street which entitles abutting property owners to compensation.

For any actual and special damage sustained by the abutting lot owner by reason of the construction of the appellee's railroad, or resulting from its use, the lot owner has his remedy by an action at law: *Dillon on Municipal Corporations*, 4th ed., sec. 712, note 1. The railroad company will be liable to the abutting lot owner for any special injury to his property occasioned by the negligence of the company in constructing its railroad or in operating it. Nothing that we have said in this opinion is to be understood as denying or in any degree abridging that right: *White v. Chicago etc. R. Co.* (1890), 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257; *Jeffersonville etc. R. Co. v. Esterle* (1878), 13 Bush (Ky.), 667; *Cadle v. Muscatine Western R. Co.* (1876), 44 Iowa, 11; *Brewer v. Boston etc. R. Co.* (1873), 113 Mass. 52; *Pennsylvania R. Co. v. Angel* (1886), 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Baltimore etc. R. Co. v. Fifth Baptist Church* (1883), 108 U. S. 317, 2 Sup. ~~233~~ Ct. Rep. 719, 27 L. ed. 739; *Frith v. City of Dubuque* (1877), 45 Iowa, 406.

Many decisions of courts of other states are cited by counsel for appellant upon the main question involved in this case. All have been carefully examined and considered, but we failed to find in them sufficient reasons for adopting their conclusions. The grounds assigned are not sufficient to justify us in holding that an interurban electric railroad constructed and operated under the restrictions imposed on the appellee is such an additional servitude and burden upon the street as to require an assessment and payment of compensation to the abutting lot owner as a condition precedent to the occupancy and use of the street by the company.

The court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

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I. Scope of Note.

In this note we shall direct our attention particularly to the more recent decisions respecting the subject of this note, since the earlier decisions were considered in previous notes on the general subject in both this series and that of the American Reports: See notes attached to Attorney General v. Metropolitan R. Co., 28 Am. Rep. 268; Stanley v. City of Davenport, 37 Am. Rep. 224; Sheehy v. Kansas City Cable Ry. Co., 4 Am. St. Rep. 402; Western Paving Co. v. Citizens' Street R. R. Co., 25 Am. St. Rep. 475; Chicago etc. Ry. Co.

v. Whiting Street Ry. Co., 47 Am. St. Rep. 272. The earlier cases respecting the question whether telegraph and telephone systems and trolley poles constitute additional servitudes were considered in an exhaustive note attached to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 233. The subject of underground easements was discussed in the note to *Sterling's Appeal*, 56 Am. Rep. 250. While the rights, obligations and remedies of persons over whose lands a public highway runs, was the subject considered in the very recent monographic note attached to *Wright v. Austin*, 101 Am. St. Rep. 102.

II. Functions and Purposes of Streets and Highways.

The primary object of streets and highways is to furnish a passageway for travelers: *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820. Hence streets cannot be burdened with any additional servitude, other than that which properly and legitimately attaches to them as public streets and highways, without just compensation being made to the abutting lot owner: *Brand v. Multnomah County*, 38 Or. 79, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 309. In discussing the right to use a street for a passageway, the court, in *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651, which involved the right of a steam railroad to use the streets, said: "Is there no distinction between the common right of every man to use upon the road a conveyance of his own at will, and the right of a corporation to use its conveyances to the exclusion of all others?—between the right of a man to travel in his own carriage without pay, and the right to travel in the car of a railroad company on paying their price? It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right where railroad trains are passing and repassing every half hour, let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers and his iron rails, and make a railroad upon a highway. Here, then, are two easements—one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it is carved out, and is a part of the public easement, and is, therefore, the gift of the public. This would do, if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. Ought not the latter, then to have been consulted? But it is unnecessary to refine upon this case. Anyone

can see that to convert a common highway running over a man's land into a railroad is to impose an additional burden upon the land and greatly impair its value."

In the principal case (*Mordhurst v. Ft. Wayne etc. Traction Co.*, ante, p. 222), it was held that a street platted or otherwise laid out in a city is dedicated to the use of the public; that it forms a part of the great system of highways of the state, and its use for intercommunication with other neighborhoods, towns and cities is one of its most important purposes.

But a public street may be applied to all purposes which are not subversive of its proper use, nor inconsistent with the uses contemplated in its dedication, grant or condemnation. An abutting owner can complain only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street: *Gaus etc. Mfg. Co. v. St. Louis etc. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339; *State v. Murphy*, 134 Mo. 348, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369. In *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654, the court, in discussing this subject, said: "All streets are highways, but not all highways are streets": *Common Council v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Commonwealth*, 14 Bush, 166. In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and as a sequence in the extent of the servitude in the land upon which they are located.

"The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use.

"In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon and above the surface, to which, in modern times, urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities and to the comfort of citizens in their more densely populated limits."

Likewise the sidewalks are considered a part of the street. Hence it is held that the city may authorize the laying of gas-pipes under such sidewalks, since land taken for a city street is subjected to a very different easement than a country highway, because of the sanitary and business needs of a city: *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, 28 Atl. 948.

The effect of new means of transit upon highways was shown by the court in *Taylor v. Portsmouth etc. St. Ry.*, 91 Me. 193, 64 Am.

St. Rep. 216, 39 Atl. 560, wherein the court said: "What servitude, then, does the public acquire by the taking of land for a public way? It is the right of transit for travelers on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas and sewage for the use of the public. It is a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand, and as the methods of life and communication may from time to time require. Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel." See, also, *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, 28 Atl. 948, to the same effect.

The most advanced view of the purposes of streets and highways which we have observed is that given by Justice Mitchell in *Cater v. Northwestern Tel. Ex. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 68 N. W. 111, 28 L. R. A. 310. The learned justice in that case said: "It seems to us that a limitation of the public easement in highways to travel, and the transportation of persons and property in movable vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public 'highway easement,' and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or text of universal application as to what is or what is not a legitimate 'street or highway use.' Courts have often attempted to do so, but have always been compelled by the logic of events to shift their ground. The only safe way is to keep in mind the general purpose of highways, and adopt a gradual process of inclusion and exclusion as cases arise. This court has held, in common with the great majority of courts, that an ordinary commercial railroad imposes an additional servitude on a street, and we applied a test as to what did and did not constitute an additional servitude, as far as it went, and as applied to such a

case, the test was doubtless correct; but, after all, the bottom fact upon which the decision really rests was, that such an appropriation of a street was practically subversive of its use by the public in the ordinary way, and also unreasonably impaired the special easements of abutting owners." And in answer to the proposition that "the primary law of the street is motion," the learned justice observed: "It is true, motion is the law of the street, in the sense that the person or thing to be transmitted or transported must move; but it is not true in the sense that the medium or agency by or through which it is conveyed or transmitted must move. Pipes laid for the transmission of water, gas and steam are immovable. So are the tracks of street railways, also the poles and wires of the trolley system. And it can make no difference in principle whether the immovable structure is on, under or above the surface of the ground, for the rights of the owner of the fee are the same in either case. . . . If an immovable structure in a highway constitutes an additional servitude, it is not merely because it is immovable, but because it unreasonably interferes with the general use of the street by the public, or because it unreasonably impairs the special easements of abutting owners." Chief Justice Start and Justice Buck filed dissenting opinions in the above case.

The proposition that when land is dedicated to or condemned for the public use for highways or streets that its use must be limited to the then known methods of travel, and transportation was also repudiated in *Detroit City Ry. v. Mills*, 85 Mich. 634, 48 N. W. 1007. The court in that case also held that the law with respect to the use of highways must be adapted to meet the needs of the people and the advance of science and civilization. Interesting dissenting opinions were also filed.

III. Rights of Abutting Owners With Respect to Streets and Highways.

When a highway is laid over private property, the owner is not thereby deprived of his title to the land covered by the road. The public acquires only an easement of passage with the rights and incidents thereto, while the owner retains the fee to the soil for all purposes not incompatible with the enjoyment of the easement secured by the public: See monographic note to *Wright v. Austin*, 101 Am. St. Rep. 102. Hence it is said that the owner of land taken for a public street holds it subject to the right of appropriation of the space above and below the surface for the purpose of public travel, without additional compensation: *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 329. The abutting owner, however, may be said to have a right to an interest in the street which is separate and distinct from that of the general public: *Long v. Wilson*, 119 Iowa, 267, 97 Am. St. Rep. 315, 93 N. W. 282; *Willamette Iron Wks. v. Oregon Ry. Co.*, 26 Or. 224, 46 Am. St. Rep. 620, 37

Pac. 1016, 29 L. R. A. 88. But the rights of the public in a street or highway are no higher or other than those of a mere easement, and the proprietors on each side presumptively own the soil in fee to the center thereof: *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213. And it is also said that the abutting owner on a public street has an easement therein of light, air and access to and from his property by means of the street of which he cannot be deprived without compensation: *Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457, 14 L. R. A. 370; *Grand Rapids etc. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Adams v. Chicago etc. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; *Gaus etc. Mfg. Co. v. St. Louis etc. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339; *Sherlock v. Kansas City Belt Ry. Co.*, 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629; *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 609; *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 25 N. E. 496, 11 L. R. A. 634.

And where a railroad is constructed and maintained along the highway in front of a man's land, he may recover for such impairment of his rights and easements in the highway as constitute damages peculiar to himself, and which are independent of such damages as he sustains in common with the public: *Smith v. Southern Pac. R. Co.*, 146 Cal. 164, 79 Pac. 868. But it was said in the principal case (*Mordhurst v. Ft. Wayne etc. Co.*, ante, p. 222), that anticipated breaches of contract or franchise between a railroad and the municipality, which may result in special damages, cannot authorize the court to enjoin the construction and operation of the road.

IV. Rights of Abutting Owners as Dependent upon the Status of Their Fee in the Street or Highway.

Ordinarily, the ownership of the abutting owner extends to the middle of the highway, or if the same person owns on both sides, he owns the whole highway, subject to the public easement of passage. And ordinarily a grant of lands bounded by a highway is presumed to carry with it the fee to the center of the highway, though this presumption does not obtain where the sovereign authorities are vested with the fee of the highway: See monographic note to *Wright v. Austin*, 101 Am. St. Rep. 104.

In some of the earlier cases great stress was laid, when determining the question of damages, upon whether the fee to the highway is or is not in the highway: See note to *Sheehy v. Kansas City Cable Ry. Co.*, 4 Am. St. Rep. 402.

But the more recent authorities seem to hold that the rights of an abutting owner do not depend upon his ownership of the soil under the street. His right flows from the fact that his lot abuts on the public street: *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 659. And

in this connection, see the discussion in *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610. And it is held that an abutting owner on a street, irrespective of whether he owns the fee, has the right to be compensated for any additional servitude placed on his property by any use of the highway, not inconsistent or necessary to its full enjoyment as such by the public: *Town of Hazlehurst v. Mayes*, 84 Miss. 7, 36 South. 33.

In *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654, it was said: "It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made, but the consensus of modern opinion seems to be that no such distinction properly exists, and that 'whether the corporation be the owner of the fee of the streets in trust for the public or whether it be merely the trustees of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways': *People v. Kerr*, 27 N. Y. 202; *Cincinnati v. White*, 6 Pet. 432, 8 L. ed. 454; *Thompson on Highways*, 7; *Elliott on Roads and Streets*, 305."

Likewise it has been held that the owners of land abutting a city street, claiming title by a grant from the municipality containing a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their land, and also for the free and uninterrupted passage and circulation of light and air: *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. 528. But in this connection see, also, *Graham v. Stern*, 168 N. Y. 517, 85 Am. St. Rep. 694, 61 N. E. 891.

V. What are Additional Servitudes in Streets and Highways.

a. In General.

1. **Servitudes Defined.**—A servitude may be briefly defined as a burden affecting property and rights: *Tomlin's Law Dictionary*. In *Fetters v. Humphreys*, 18 N. J. Eq. 262, it was said: "A privilege or right attached to one tenement or parcel of land, to enjoy some benefit in or over another tenement or parcel, is called an easement of the dominant tenement, to which it belongs, and a servitude upon the servient tenement, or that in which it exists."

The nature of burdens which may be denominated as additional servitudes was shown in subdivisions II and III.

2. **Bicycle Paths.**—"In the most primitive state of society the conception of a highway was merely a footpath, in a slightly more advanced state it included the idea of a way for pack animals; and

next, a way for vehicles drawn by animals—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence, it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designed': *Cater v. Northwestern Tel. Ex. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310.

Consequently, following the doctrine of expansion announced in the above case, it has been held that a law authorizing the maintenance of bicycle side-paths on public highways does not impose an additional servitude upon the highway, since it is not dissimilar to a regulation requiring all vehicles going in either direction to keep to the right: *Ryan v. Preston*, 59 App. Div. 97, 69 N. Y. Supp. 100.

3. **Market Place on the Street.**—An ordinance providing that a certain street shall be used as a market for the sale of country produce has been held to constitute an additional servitude authorizing compensation to the abutting owners: *State v. Laverack*, 34 N. J. L. 201. See, also, *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783. It seems that the holding of a fair or market on a highway is considered an indictable offense, unless legalized by custom: See *Rex v. Smith*, 4 Esp. 109; *Rex v. Canfield*, 6 Esp. 136; *Elwood v. Bullock*, 13 L. J., N. S., 330.

4. **Hydrants, Water-tanks and Pumping Plants.**—In *Witcher v. Holland W. W. Co.*, 66 Hun., 619, 20 N. Y. Supp. 560, hydrants and pipes in highways of an unincorporated village were held to constitute no additional servitude. The court based its holding largely upon the fact that the health and comfort of the people were promoted by the use of wholesome water, and that the buildings and property of the village were to a large extent protected from fires by the use of such water-pipes and hydrants.

But the erection of a water-tank in the center of a street, occupying one-half of the width thereof, and the erection and operation of a steam engine in connection therewith for the purpose of supplying the city and its residents with water, is an additional servitude to the street: *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77. Though in *West v. Bancroft*, 32 Vt. 367, a reservoir or cistern within the limits of the highway for the purpose of retaining water with which to sprinkle the highway was held to constitute no additional servitude, since it tended to facilitate travel and add to the ease, comfort and convenience of the traveler or his beasts.

Likewise an abandoned well, originally dug in the street by the lot owner may be used by the municipality without creating an additional servitude. The court saying: "Town pumps have long been in existence—long before Hawthorne's historical pump poured forth its rill—and it cannot be justly said that a municipal corporation is guilty of maintaining a nuisance where it does no more than maintain a pump in one of its streets": *Lostutter v. City of Aurora*, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259.

5. **Removal of Trees from the Street.**—It seems that the cutting down of trees standing on the edge of a sidewalk and not interfering with the use of the street or sidewalk, even though done for the purpose of more conveniently erecting poles for the stringing of electric wires, and done by authority of a board of aldermen, constitutes an additional servitude for which compensation must be made: *Brown v. Asheville Electric Light Co. (N. C.)*, 51 S. E. 62. In this connection, see, also, *Tate v. Greenboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, and *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108.

6. **Practical Appropriation of the Whole Street.**—It seems that where there is a permanent practical obstruction of a street in front of an abutting lot owner, he may recover compensation from the person so obstructing it: *Kansas etc. Ry. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051. But a merely technical or trifling interruption or obstruction is not regarded as a substantial impairment of the easement of the street: *Newell v. Minneapolis etc. Ry. Co.*, 35 Minn. 112, 59 Am. Rep. 803, 27 N. W. 839. Indeed, it is even held that where the maintenance of a steam railroad in a narrow street which is largely used by heavy trucks and wagons engaged in the wholesale business, necessarily results in denying to the public and the abutting owners the right to use the street in a manner which they are entitled to under the laws of the state, that the ordinance allowing the use of such street for such railroad purposes destroys it for street purposes and is therefore unauthorized: *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547, 26 S. W. 698, 24 L. R. A. 516. The court in the case just cited, in rendering its opinion said: "The learned counsel urges with great force and plausibility that this railroad is a public use of the street, but it seems to us he ignores the fact that while the railroad is a public carrier, it has no right to the exclusive use of a street, and such for all practicable purposes is the effect of this ordinance and its use of this street. No case in this state is authority for such exclusive use of a highway, and if it was we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monopolize a public street and shut out the public and other carriers."

The same principles were substantially upheld in *Detroit City Ry. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007; *People v. Ft. Wayne*

etc. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Carli v. Union Depot etc. Co., 32 Minn. 101, 20 N. W. 89.

7. **Effect of Unauthorized Use of an Easement.**—The right to compensation for injuries to private property by the appropriation of a street to a public use not contemplated when it was opened and dedicated as a highway for ordinary travel, such as the laying of railroad tracks thereon, is in no wise affected by the question whether the city authorities did or did not consent to such appropriation: *Southern Pacific R. Co. v. Reed*, 41 Cal. 256. But it is also held that where a street railway company constructs its tracks in a town highway without the consent of the authorities or the abutting owners, it is a trespasser, and that the abutting owner, though having no title to any part of the street, may enjoin the operation of the road: *Henning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111.

b. Surface Servitudes.

1. Means of Transportation.

A. **Street Railways in General.**—The general rule as to the test of whether any particular system of operating street-cars constitutes an additional servitude was well stated in *La Crosse City Ry. Co. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923. The court there said: "In determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross-wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question.

"If the crucial test, to be applied in determining whether a street railway company is entitled to a free right of way along a public street as against abutting property owners, were whether a different motive power is used than was contemplated when the street right of the public was acquired, all new discoveries of improved modes of travel would require, as has often been remarked, dealing with the owners of the fee of the land on which the streets are located before the public could have the benefit thereof. When a new mode of using the public streets and highways is adopted, the question arises whether it violates the rights of the owners of the

fee to the streets and is inconsistent with the original design in setting the land aside for a public thoroughfare, keeping in view the fact that such design is presumed to have contemplated the adoption from time to time of improvements in mechanical appliances and their use in aid of travel upon the street—the keeping abreast with the march of civilization, with the growth of population and consequent increase of travel, so as to adequately satisfy public needs and conveniences. Lands are set aside for public streets and highways, not for the present, with its necessities and modes of use, but for all time, with all the added demands that may be made upon the public ways within the scope of their original design, in the course of natural development that is constantly going on. Subject to that test the traction engine, automobile and street railways, regardless of the motive power used, are entitled to the use of the street, subject to the necessity for consent by public authority in proper cases, and reasonable police regulations.”

And in an early case in Michigan (*Grand Rapids etc. R. Co. v. Heisel*, 38 Mich. 62), in speaking of the status of street railroads with respect to creating an additional servitude, Justice Cooley observed that: “A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it; if they were compensated for the taking of their land originally, they are supposed to be compensated for all possible losses they may suffer from its being put to proper uses as an avenue of local trade and passage, and if without compensation they dedicated it to the public, they are supposed to have contemplated and assented to all such uses.”

Hence, the general rule is also announced that the construction of a street railway, properly authorized, upon the streets of a city for the carriage of passengers only, imposes no such additional servitude as necessitates the payment of additional compensation to the abutting owners, where the grade of the street is not interfered with: *Birmingham Traction Co. v. Electric Co.*, 119 Ala. 137, 24 South. 502, 43 L. R. A. 233; *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597, 23 Pac. 765; *Chicago etc. Ry. v. Whiting St. Ry. Co.*, 139 Ind. 297, 47 Am. St. Rep. 264, 38 N. E. 604; *Taylor v. Portsmouth etc. St. Ry.*, 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; *Appeal of Milbridge etc. R. Co.*, 96 Me. 110, 51 Atl. 818; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264; *De Geofroy v. Merchants' Bridge etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 659; *Hester v. Durham Traction Co. (N. C.)*, 50 S. E. 711; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am.

St. Rep. 763, 23 Atl. 884; San Antonio etc. Ry. Co. v. Limburger, 88 Tex. 79, 53 Am. St. Rep. 730, 30 S. W. 533. See, also, the notes to Western etc. Co. v. Citizens' Street R. Co., 25 Am. St. Rep. 478, and Chicago etc. Ry. Co. v. Whiting etc. St. Ry. Co., 47 Am. St. Rep. 271.

And in accordance with the general rule announced above, it has been universally held that street railways in which horses are used as the motive power do not constitute an additional servitude: Elliott v. Fairhaven etc. Co., 32 Conn. 579; Randall v. Jacksonville St. Ry. Co., 19 Fla. 409; State v. Jacksonville St. Ry. Co., 29 Fla. 590, 10 South. 590; Campbell v. Metropolitan St. Ry., 82 Ga. 320, 9 S. E. 1078; Eichels v. Evansville St. Ry. Co., 78 Ind. 261, 41 Am. Rep. 561; Sears v. Marshalltown St. Ry. Co., 65 Iowa, 742, 23 N. W. 150; Brown v. Duplessis, 14 La. Ann. 842; Briggs v. Lewiston etc. Ry., 79 Me. 363, 1 Am. St. Rep. 316, 10 Atl. 47; Hodges v. Baltimore Union Pass. Ry., 58 Md. 603; Attorney General v. Metropolitan Ry., 125 Mass. 515, 28 Am. Rep. 264; Grand Rapids etc. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Newell v. Minneapolis etc. Ry. Co., 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; Van Horne v. Newark Pass. Ry., 48 N. J. Eq. 332, 21 Atl. 1034; Hinchman v. Paterson Horse Ry., 17 N. J. Eq. 75, 86 Am. Dec. 252; Smith v. East End St. Ry., 87 Tenn. 626, 11 S. W. 709. See, also, note to Attorney General v. Metropolitan R. Co., 28 Am. Rep. 267.

So, also, a cable road is held not to constitute an additional servitude: Rafferty v. Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763, 23 Atl. 884.

Inasmuch as street railways, propelled by means of electricity, are but modern and improved methods of using the streets as public ways, without any considerable inconvenience or obstruction to other proper use of the streets, it is almost universally held that an electric street railway for the transportation of passengers only and conforming its track to the surface of the street is not an additional servitude, but, on the contrary, a legitimate use of the streets within the original purposes of their dedication: Birmingham Traction Co. v. B. & R. Electric Co., 119 Ala. 137, 24 South. 502, 43 L. R. A. 233; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Philadelphia etc. Co. v. Wilmington City Ry. (Del.), 38 Atl. 1067; Southern Ry. v. Atlanta etc. Ry., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Chicago etc. R. Co. v. General Electric Ry., 79 Ill. App. 569; General Electric Ry. v. Chicago etc. Ry., 184 Ill. 588, 56 N. E. 963; Snyder v. Ft. Madison etc. R. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 44 Am. St. Rep. 203, 23 S. W. 592; Georgetown etc. Traction Co. v. Mulholland, 25 Ky. Law Rep. 578, 76 S. W. 148; Taylor v. Portsmouth etc. Co., 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; Poole v. Falls Road Electric R., 88 Md. 533, 41 Atl. 1069; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 380;

Eustis v. Milton St. Ry., 183 Mass. 586, 67 N. E. 663; *Nichols v. Ann Arbor etc. St. R. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Dean v. Ann Arbor St. R. Co.*, 93 Mich. 330, 53 N. W. 296; *Elfelt v. Stillwater St. R. Co.*, 53 Minn. 68, 55 N. W. 116; *Placke v. Union Depot R. Co.*, 140 Mo. 634, 41 S. W. 915; *Halsey v. Rapid Transit St. Ry.*, 47 N. J. Eq. 380, 20 Atl. 859; *Roebbling v. Trenton Pass. R. Co.*, 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; *Budd v. Camden Horse R. Co.*, 70 N. J. L. 782, 59 Atl. 229; *Merrick v. Intramontaine R. Co.*, 118 N. C. 1081, 24 S. E. 667; *Heilman v. Lebanon etc. Co.*, 145 Pa. St. 23, 3 Atl. 389; *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; *Cumberland Tel. etc. Co. v. United Electric R. Co.*, 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; *Reid v. Norfolk City Ry. Co.*, 94 Va. 117, 64 Am. St. Rep. 708, 26 S. E. 428, 36 L. R. A. 274; *Younkin v. Milwaukee etc. Traction Co.*, 120 Wis. 477, 98 N. W. 215. But the contrary rule seems to obtain in New York: *Peck v. Schenectady Ry. Co.*, 170 N. Y. 298, 63 N. E. 357; *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213. And on the general subject see, also, the note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 233.

Sometimes the courts hold that an electric or other system of surface street railways constitutes an additional servitude, not because of the particular motive power employed, but because of the fact that its situation upon the street operates as an obstruction to the proper use of the street.

In *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751, the court held that the poles and wires of an electric railway system constituted an additional servitude. The reason for so holding was shown by the following statement in the opinion, viz.: "In the case at bar the railway company with its poles and wires has exclusively appropriated a portion of these streets to its own use, to the exclusion of the rest of the public. If the railway company were moving its cars on the surface of these streets by electric power without so permanently and exclusively occupying any portion of the street, we do not think the mere fact that the motive power was electricity would take the use out of the purpose contemplated by the original grant. The use made of these streets by the railway company is not one in common with that of the public generally. Its poles and wires remain, and must remain, and exclusively occupy particular portions of the street and continuously exclude the public from such portions. Whether a use made of the street is an additional burden upon the easement, we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose permanently and exclusively occupy all or a portion of the street, to the continued exclusion of the rest of the

public. If they do not, then it is not an additional burden; if they do, it is."

The same principles were upheld in *Linden Land Co. v. Milwaukee Electric Ry.*, 107 Wis. 493, 83 N. W. 851, where it was said that trolley wires and poles were not additional servitudes unless it is shown that it is proposed to locate poles or structures in such a manner as to interfere with an abutting owner's right of access to his property. And likewise in *Snyder v. Ft. Madison St. Ry. Co.*, 105 Iowa, 284 75 N. W. 179, 41 L. R. A. 345, although it was said that electric street railway poles in a street did not constitute an additional servitude, still if it could be shown that a trolley pole was placed in front of an abutting owner's property without necessity therefor, and for the purpose of annoying the abutting owner, and injuring his property, that the court would order the pole to be removed.

In *People v. Ft. Wayne etc. Ry.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752, it was sought to be shown that the street railway track constituted an additional servitude. The track was four feet eight and a half inches wide, and placed in the middle of the street with a twenty-five foot driveway; the cars in use were seven feet nine inches in width. The court held that the public were not deprived of the use of the street.

But where a street railway is constructed by making cuts and fills which obstruct access to the property of an abutting owner, it will be held to constitute an additional servitude: *Nichols v. Ann Arbor etc. Ry. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. And if a street railway should be so constructed as to practically inclose an abutting owner with embankments and thereby materially impair his property rights, it will be considered as having created an additional burden: *Merrick v. Intramontaine R. Co.*, 118 N. C. 1081, 24 S. E. 667. As to the effect of a change of grade of a highway upon the right of abutting owners to obtain compensation therefor, see the note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 389.

B. Elevated Railroads.—Although the states in which the question whether an elevated railroad is an additional servitude is raised or decided are not very numerous, still the question does not seem to be uniformly settled.

In New York the erection and operation of an elevated railway in a street is held inconsistent with the use of the street, and it is held that the abutting owner on the street possesses an easement of light, air and access to and from the adjoining street which he cannot be deprived of without compensation: See authorities cited in note to *Western etc. Co. v. Citizens' Street R. Co.*, 25 Am. St. Rep. 479; also *Story v. New York Elevated R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146 (the leading New York case); *Matter of Seaside etc. El. R. Co.*, 83 Hun, 143, 31 N. Y. Supp. 630; *Lahr v. Metropolitan El. Ry.*, 104 N.

Y. 268, 10 N. E. 528; *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 25 N. E. 496, 11 L. R. A. 634; *Kane v. New York El. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; *Williams v. Brooklyn R. Co.*, 126 N. Y. 96, 26 N. E. 1048; *Bohm v. Metropolitan El. R. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344; *Hughes v. Metropolitan El. Co.*, 130 N. Y. 14, 28 N. E. 765; *Fifth Nat. Bank v. New York El. R. Co.*, 24 Fed. 114; *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 10 Sup. Ct. Rep. 743, 34 L. ed. 231.

In Pennsylvania it was held in *Jones v. Erie etc. R. Co.*, 151 Pa. St. 30, 31 Am. St. Rep. 722, 25 Atl. 134, 17 L. R. A. 758, that although the proximity of an elevated railroad, so that the noise of passing trains can be heard, or the dust and smoke therefrom be noticeable, imposes no additional servitude, still, if the construction of the railroad affects the adjacent owner by interfering with the access to or drainage from his property, or the exclusion of light and air therefrom, that it then imposes an additional servitude for which he may recover damages.

And in a very recent case in Missouri, that of *De Geofroy v. Merchants' etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 659, the court discussed the subject of elevated railroads, with respect to their creating an additional servitude, very exhaustively. It was there held that an elevated steam railroad, constructed on permanent pillars or arches in a public street by consent of the municipality, so as to shut out the light and air of abutting owners, and interfere with the free use of the street, and their access to and from their premises, is an additional servitude, and one not in contemplation when the street was acquired or laid out, and one for which the abutting owners are entitled to compensation for any depreciation in the value of their property caused by the construction of such railroad.

In Illinois, although it is held that an elevated railroad for the transportation of passengers is not an additional servitude, still it is held under the Illinois constitutional provision which provides that "private property shall not be taken or damaged for public use without just compensation" that an abutting owner who suffers special damages may recover therefor: *Chicago Office Bldg. v. Lake Street El. Ry.*, 87 Ill. App. 594. In this connection, see, also, *Chicago etc. R. Co. v. Cogswell*, 44 Ill. App. 388; *Doane v. Lake Street El. R. Co.*, 165 Ill. 518, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97; *Aldrich v. Metropolitan West Side El. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; *Aldis v. Union El. R. Co.*, 203 Ill. 567, 68 N. E. 95. And in *Freiday v. Sioux City etc. Transit Co.*, 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246, it was held that an elevated steam railroad operated to convey passengers to different portions of the city was a "railway" and not a "street railway," under the Iowa statute, providing for compensation to owners of lots abutting streets in which a "railway" may be laid.

In Massachusetts it seems that the statutes provide that the location of a railway system in any public way creates an additional servitude; hence the question where an elevated railroad is constructed seems to be confined to whether the abutting owner has a right to recover for the noise incident to the operation of the elevated service on the ground of constituting a private nuisance: *Baker v. Boston El. Ry. Co.*, 183 Mass. 178, 66 N. E. 711. See, also, the note to *Field v. Barling*, 41 Am. St. Rep. 325, discussing the question of the easement of light and air with respect to its impairment by the construction of an elevated railroad. And on the general subject of the easements of access, light and air, which, under the rules announced in some of the states, are important considerations where damages for the erection of an elevated railroad are in issue, see the following cases and notes: *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409; *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399; *O'Brien v. Central Iron etc. Co.*, 158 Ind. 218, 92 Am. St. Rep. 305, 63 N. E. 302, 57 L. R. A. 508, and the monographic note to *Wright v. Austin*, 101 Am. St. Rep. 102.

C. Suburban or Interurban Railways on Highways.—The question whether the operation of what are commonly called street-cars outside of municipal limits into the suburbs of the city, or to other towns and cities, without creating an additional servitude is one which is not yet clearly and definitely settled. Undoubtedly, the question of suburban and interurban transportation is one of the new means of transportation which highways will be charged with as being within the demands of improved means of using the highways, even though the former means of transportation were by means of what is generally called the steam railroad.

In some states the statute declares that any street railway operated by other power than steam, which extends beyond the corporate limits to another city or village, shall be known as an interurban line: *Cedar Rapids etc. Ry. Co. v. Cummins*, 125 Iowa, 430, 101 N. W. 176. But in Ohio an interurban electric railroad is classed as a street railroad under the statute: *Cincinnati etc. R. Co. v. Lohe*, 68 Ohio St. 101, 67 N. E. 161.

In some of the comparatively recent cases a clear distinction was remarked between city streets and county highways, while the more recent cases seem to extend the functions of highways and especially where the highway is near a large city or a much used highway between different cities and towns.

In *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654, the court said: "All streets are highways, but not all highways are streets: *Common Council v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Commonwealth*, 14 Bush, 166.

"In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and as a sequence in the extent of the servitude in the land upon which they are located.

"The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use.

"In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements beneath, upon, and above the surface, to which in modern times urban streets have been subjected."

The expanding functions of highways was shown in *Zehren v. Milwaukee Electric Ry. etc. Co.*, 99 Wis. 83, 67 Am. St. Rep. 844, 41 L. R. A. 575, 74 N. W. 538. The questions considered by the court were stated as follows: "If it be said that the highway before us in this case is in effect a city street because of its close proximity to the city, and because the adjoining lands are platted, and because it connects a suburban village with the city, and that a clear distinction ought to be drawn between such a highway and the ordinary country road in farming districts, the inquiry will then be, Can such a distinction be practically drawn, and can it be satisfactorily applied, and upon what solid grounds will it rest? A distinction so important must in reason be one which can be drawn with some reasonable degree of certainty in every case, and must be capable of practical application. Is the line to be drawn according to density of population, and, if so, what degree of density is to be the test? Is it to depend upon the activity and hopefulness of adjoining land owners in platting their land into building lots, or upon the question whether a neighboring village or town can properly be called a suburb of the principal city? Or is it to depend upon a judicious consideration of all these conditions massed together, and upon a conclusion to be evolved from the entire mass, which will determine the answer to the question in each particular case, but in no other? Or, on the other hand, must it be held that, in order to make a highway a city street, it must lie within the corporate boundaries of the city, and that outside of those boundaries no reasonable or practicable distinction can be drawn based either on proximity to the city, or on platting of lands or density of population, or upon the fact that the highway connects the city with a neighboring suburban village? These are all important questions, which, as before indicated, are new in this court, and demand careful consideration."

The court, in its discussion of the subject with particular reference to the question of additional servitude, said: "There is, however, another question in the present case which is much broader in

its scope, and which is becoming a more pressing question every day; and that is the question whether passenger railroads operated by mechanical power can be laid over country highways without consent of, or compensation paid to, the adjoining land owner; or, in other words, Are they additional burdens to the fee? The development of electric railways and motors is so rapid that this question should, if possible, be settled, as the day is evidently not far distant when such passenger railways running from city to city will be numerous, and extend to all parts of the state."

And continuing, the court observed: "That there are many and marked differences between the uses to which a city street is put and the uses to which a country highway is put cannot be denied; nor can it be denied that the uses contemplated when the land is taken vary widely, except that both are intended for purposes of travel. The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot-passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street-car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the country highways and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense.

It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus the operation of this newly developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many."

The court, after stating its conclusion that an interurban electric railway running upon the highways through country towns was an additional burden upon the highway, adverted to the question whether a distinction should be drawn between a highway in close proximity to a city, or running between the city and a neighboring suburb, and an ordinary country road through a farming district. On account of the difficulty in drawing any clear line of demarcation, the court held that the city limits furnished a definite line within which a street railway should be confined in its more restricted capacity as a street railway.

In a very recent case in the Wisconsin court (*Younkin v. Milwaukee etc. Traction Co.*, 120 Wis. 477, 98 N. W. 215), the question whether an interurban railway could cease to be such while passing through a city was raised. The railway in question was an electric line from Milwaukee to Waukesha Beach, but passing through the city of Waukesha. It was admitted that the line was an interurban line creating an additional servitude as to points on the country highway, but it was urged that it ceased to cast any additional servitude upon the lands of abutting owners while passing through the city of Waukesha, though loaded with through passengers, because while doing so it stopped at street crossings, whereas while passing along the country highway it stopped only when convenient or at remote points. But the court held that it created an additional servitude upon the lots abutting upon the street over which it passed.

The early decision of the Minnesota supreme court in *Carli v. Stillwater St. Ry. Co.*, 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. 205, was also to the effect that a city railway which was a connecting link between two ordinary "commercial" railways, constituted it an ordinary "commercial railway," and in no sense "in aid of the street."

But in a later case that same court, in *Newell v. Minneapolis etc. Ry. Co.*, 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839, modified the earlier decision to some extent. The line of railway extended from a central point in Minneapolis, several miles to the city limits, thence via Lakes Calhoun and Harriet for a further distance of about eighteen miles to Lake Minnetonka. The cars were drawn either

singly or in trains of from two to four cars, and, on rare occasions, in greater number than four cars, the motive power being comparatively noiseless and smokeless. The fare for points within the city limits was uniform with that of other street railways, while an increase was charged for the more distant points. The court held that it did not create an additional servitude as to its route along the city streets. The court stated that the manner and effect of operating a street railway were the tests of its rights upon the streets. It then observed with respect to the railway in question that: "While so far as construction and maintenance are concerned, the facts are expressly found that the surface of the street is not essentially changed or disturbed, there is no fact found showing that the operation of defendant's railway seriously jeopardizes or interferes with the safety and security or convenience, as respects either person or property of anyone who desires to avail himself of the public and common right of user. It may well be that defendant's railway could be so operated, even as a purely passenger street railway, as substantially to interfere with, if not to put a practical end to, the use of the street by the general public. It is not impossible to conceive that any ordinary horse street railway could be operated with like effect." And in another part of the decision the court very pertinently observed: "If it is, in fact, a passenger street railway within the city limits, how can it become anything else there because it becomes something else elsewhere? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is just as legitimate and just as clearly and completely a lawful and proper enjoyment of the public and common easement in the one case as in the other."

In *Chicago etc. Co. v. Milwaukee etc. Electric Ry. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856, it was held that an interurban electric railway for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, was not a street railway, and that it imposes an additional burden upon a street or highway. And likewise an interurban railway with T rails, carrying passengers and freight, was held to impose an additional burden upon the highway: *Schaaf v. Cleveland etc. Co.*, 66 Ohio St. 215, 64 N. E. 145. And an electric railway traversing country highways, without legislative consent, and connecting widely separated cities and towns, was also held to impose an additional servitude on the property fronting on highway so occupied: *Pennsylvania R. Co. v. Montgomery County etc. Ry.*, 167 Pa. St. 62, 46 Am. St. Rep. 659, 31 Atl. 468, 27 L. R. A. 766.

And it is quite frequently held that electric railways on highways ordinarily do not create an additional servitude thereon: *Philadelphia*

etc. R. Co. v. Wilmington City Ry. Co. (Del.), 38 Atl. 1067; Georgetown etc. Traction Co. v. Mulholland, 25 Ky. Law Rep. 578, 76 S. W. 148; Green v. City etc. Ry. Co., 78 Md. 294, 44 Am. St. Rep. 288, 28 Atl. 626; Austin v. Detroit etc. Ry., 134 Mich. 149, 96 N. W. 35; Ehret v. Camden etc. Co., 61 N. J. Eq. 171, 47 Atl. 562.

But it was said in Lonaconing etc. Ry. v. Consolidation Coal Co., 95 Md. 630, 53 Atl. 420, that such electric railways on highways could not monopolize the entire roadway or so much of it as to prevent its convenient use by persons traveling it on foot or with horses or vehicles, whose rights remain the same notwithstanding its presence thereon.

D. Ordinary Commercial Railroads.—The weight of the earlier authorities is to the effect that where the fee of the streets of a city is in the abutting owner, the construction of an ordinary steam or commercial railroad upon the streets is regarded as the imposition of an additional servitude, but not so where the fee was vested in the city: See monographic note to Vanderlip v. City of Grand Rapids, 16 Am. St. Rep. 612; note to Jones v. Erie etc. R. R. Co., 31 Am. St. Rep. 733; note to Stanley v. City of Davenport, 37 Am. Rep. 224.

But the earlier doctrine to the effect that the rights of the abutting owner were dependent to a large extent upon the question whether he owned the fee of the streets or highway has, it seems, been repudiated by the majority of the courts: See subdivision IV. Hence, the rule seems to be quite well established that an ordinary commercial railroad creates an additional servitude upon the street or highway: The principal case (*Mordhurst v. Ft. Wayne etc. Traction Co.*, ante, p. 222); *Inlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392; *Terre Haute etc. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164; *Onset St. Ry. v. County Commrs.*, 154 Mass. 395, 28 N. E. 286; *Adams v. Chicago etc. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; *Jaynes v. Omaha St. Ry.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; *Bork v. United New Jersey R. etc. Co.*, 70 N. J. L. 268, 103 Am. St. Rep. 808, 57 Atl. 412; *White v. Northwestern etc. Ry. Co.*, 113 N. C. 610, 37 Am. St. Rep. 639, 18 S. E. 330, 22 L. R. A. 627; *Chicago etc. Co. v. Milwaukee etc. Electric Ry. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856.

But in a very recent case in Missouri (*De Geofroy v. Merchants' etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 79 S. W. 386, 64 L. R. A. 659), it was held that the construction and maintenance of a steam or street railroad on the grade of a street in pursuance of municipal authority is not an additional servitude on the land upon which the street is constructed, and falls within the use contemplated when the street was laid out or acquired by the public.

E. Distinction Between Street and Commercial Railroads.—The court in the principal case (*Mordhurst v. Ft. Wayne etc. Traction*

Co., ante, p. 222), in discussing the distinction between a street and a commercial railroad, very pertinently observed: "This distinction does not rest upon a difference in name—one being denominated a street railroad or a passenger railroad, and the other a commercial or freight railroad—nor upon the motive power employed, nor upon the kind of rail used, nor upon the length of the railroad. It results from the nature of the business done by each of the two kinds of railroads, and the physical agencies and manner by which and in which that business is carried on. Those of the one are consistent with the use of the street by the lot owner and the general public, and if not directly beneficial to the abutting real estate, are not detrimental to it. They relieve the streets from some of the burdens of travel upon it, they facilitate travel between different parts of the city, and they enhance the value of abutting property by increasing the convenience of access to it. The business of the other class of railroads, and the means by which it is necessarily carried on, require the service of entirely dissimilar agencies and methods. Great trains of cars moving along the streets or standing upon them are real and serious obstructions to all other uses of the highway. Such trains make a loud noise by day and by night, and disturb the quiet of neighborhoods. Access to abutting property is rendered difficult and dangerous, and the jarring and shaking of buildings is annoying to the occupants, and often injurious to the structures themselves. If the cars are propelled by steam, then there is the additional inconvenience of smoke, cinders, sparks, the blowing off of steam, the ringing of the engine bell, and the whistling of the locomotive. There are good and substantial reasons why compensation should be paid to the owners of abutting lots when a street in a city is used for such a purpose and in such a manner."

The difference between street and commercial railroads was adverted to, but not stated, in *Elfelt v. Stillwater St. Ry. Co.*, 53 Minn. 68, 55 N. W. 116. And the difference has been taken as admitted in numerous cases.

But in *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654, a distinction between a street railway carrying passengers only and one carrying freight, also was urged upon the court. The court, in answer to the argument, observed: "We fail to appreciate the philosophy of the distinction; on the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public it involves its uses, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed, of those yet to be discovered, must have been contemplated when the street was opened, and the right of way obtained, whether by dedication, purchase or condemnation

proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control; and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress or his right to light and air shall be interfered with."

Thus, it will be observed that though the rule announced by the California court may appear to be quite broad, that still it protects the abutting owner as to the actual damages which he may sustain.

In a recent Texas case (*Rische v. Texas Transportation Co.*, 27 Tex. Civ. 33, 66 S. W. 324), the question whether the transportation of freight over city streets constituted the railway a commercial one was the issue. The court said: "It was first held that street-cars drawn by horses and used for the transportation of passengers from one part of a city to another did not constitute an additional servitude on the streets. They were distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam emitted, the danger of frightening horses, the danger to life, and the size and weight of cars and locomotives. When the steam motor and electric cars were invented, all the reasons given why horse railways were not an additional servitude to streets were ignored, except that they must be carriers of passengers and not of freight, from one point to another in a city. In one instance, at least this last reason has been discarded, and it has been held that the streets can be used by railways, whatever be the motive power, and for the carriage of both freight and passengers: *Montgomery v. Santa Ana etc. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654. The weight of authority, however, is that a street passenger railroad, laid on the surface or established grade of a street, is a legitimate use, while all other railroads are not: *Lewis on Eminent Domain*, sec. 115 i; *Elliott on Railroads*, secs. 6, 557; *Funk v. St. Paul etc. Ry. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608, 63 N. W. 1099, 29 L. R. A. 208.

"There has been no direct adjudication of this matter in this state, but there are several cases where damages have been allowed which have resulted from the construction of railroads along streets, and this could have been done only on the theory that they were an additional servitude to the street: *Gulf etc. Ry. Co. v. Eddins*, 60 Tex. 656; *Gulf etc. Ry. Co. v. Bock*, 63 Tex. 245; *Texas etc. Ry. Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565; *Gulf etc. Ry. Co. v. Fuller*, 63 Tex. 467; *Fort Worth etc. Ry. Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180. The railroads in question in the cases cited were steam railroads, but, as we have shown, this would not distinguish them from street railways which may be operated by any motive power, and the decisions must be justified on

the ground that the roads were the carriers of freight, which is all that distinguishes the commercial railway from the street railway."

In *Williams v. City Electric St. Ry. Co.*, 41 Fed. 556, the chief difference between street railroads and railroads for general traffic was said to consist in their use and not in their motive power, although the court also adverted to the fact that street railways carry only passengers and not freight.

In *Nichols v. Ann Arbor etc. Ry. Co.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371, the court differentiated an ordinary street railway from a commercial road principally in that a street railway is usually constructed on a level with the surface of the street, so that vehicles may pass and repass over it. It seems that in the case at bar a light-weight T rail was used, and the railway was laid along the side of a traveled portion of a country highway. The articles of incorporation allowed it to carry freight, although the company claimed that it only intended to carry light merchandise for the benefit of its passengers.

And in *Chicago etc. Ry. Co. v. Milwaukee etc. Ry. Co.*, 95 Wis. 561, 60 Am. St. Rep. 136, 70 N. W. 678, 37 L. R. A. 856, it was held that the construction on a public street of a commercial street railway, that is one for the transportation of merchandise, personal baggage, mail and express matter, as well as passengers, is, though operated by electricity, not a mere exercise of the public easement previously acquired by the establishment of such street, but constitutes an additional servitude or burden.

F. Distinction Between Carriers of Light Express and Carriers of Freight.—In the case cited above the court apparently refused to draw any distinction because of the fact that the railway company proposed to carry merchandise in a limited quantity. But in the principal case (*Mordhurst v. Ft. Wayne etc. Traction Co.*, ante, p. 222), the court drew the distinction as one of the expanding uses of streets and highways. It said: "The carriage of light express matter, passenger baggage, and mail matter upon street-cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied and obstructed by it to no greater extent than it would be by a street-car. If two constitute a train, they will take up no more space and do no more injury than a motor-car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage and United States mail matter are carried in a car does not affect the property owner nor injure his property. The transportation of articles of this kind does not create any resemblance between the interurban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are caused by either passenger or freight trains on such a railroad." And continuing the court said: "Rapid and

cheap transportation of passengers, light express and mail matter between neighboring towns and cities may be quite as necessary and as largely conducive to the general welfare of the places so connected and their inhabitants as the like conveniences within the town or city. Where such transportation is furnished by an inter-urban electric railroad operated under the conditions and restrictions contained in the agreement between the appellee and the city of Fort Wayne, we do not think the construction and operation of such a railroad in such a manner constitutes an additional servitude upon the street which entitles abutting property owners to compensation."

G. Operation of Private Railroads.—It seems that a city has no authority to allow any individual or corporation to construct or operate a purely private railroad upon the public streets of the city. Statutes which have reference to railroad companies or others constructing or operating railroads through or upon the public streets of a city, simply have reference to such railroads as perform the duties of common carriers and to such railroads as are public or quasi public in their character: *Mikesell v. Durkee*, 34 Kan. 509, 9 Pac. 278; *Bradley v. Pharr*, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; *Glaessner v. Anheuser-Busch Brew. Assn.*, 100 Mo. 508, 13 S. W. 707.

But in Massachusetts, under a statute allowing the construction and operation of railroads for private use, a track on a public highway from a stone quarry to a steam railroad was held to be no additional servitude. The court observed: "The use of a highway for the transportation of merchandise to be used by different purchasers in many places is a public use, and the defendant corporation in carrying its stone over the road is doing it as one of the public. It may be better for the condition of the road, and more for the interests of the general public, that the products of this quarry should be transported over the road on iron rails, than that the surface should be rutted with the wheels of heavily loaded wagons. The legislature was well warranted in recognizing that this kind of use of a highway might be a proper public use of it, and the selectmen have kept well within the statute in prescribing regulations."

H. Maintenance of Switching-tracks or Terminal Facilities in Street.—A city council has no delegated power to grant a franchise which will burden the streets with a switch-track to be operated by a steam railroad exclusively for the convenience and private use of a private corporation to the detriment of the citizens residing on such street and to the damage of their property abutting thereon: *Cereghino v. Oregon Short Line R. Co.*, 26 Utah, 467, 99 Am. St. Rep. 843, 73 Pac. 634. So, also, it is held that if a railway by blocking the street with cars or by excessive switching impairs an abutting owner's easement of ingress and egress, he is entitled to have the

nuisance abated: *Brumit v. Virginia etc. Co.*, 106 Tenn. 124, 60 S. W. 505.

But with respect to terminal facilities it was held in *People v. Rock Island*, 215 Ill. 488, ante, p. 179, 74 N. E. 437, where a river frontage was added to the street by filling in the bed of the river and thus increasing the original width of the street to a large degree, and such increased area was used for railroad purposes, including the maintenance of a depot and freight-house thereon, but leaving an unobstructed street eighty feet wide for public travel, that a mandamus commanding the railway company to remove its depot and freight-houses would not be granted where the right to so use such areas had been previously granted by the city.

On the question as to the right to maintain switches and turnouts on streets, see the note to *Western etc. Co. v. Street R. Co.*, 25 Am. St. Rep. 478.

2. Effect of Change from Original Use or of an Increased Use of the Servitude.

A. Change of County Road into a City Street.—The conversion of a county road into a city street is said not to create an additional servitude: *Huddleston v. Eugene*, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444.

B. Change of Motive Power in Operation of Street Railway System. The kind of motive power used to propel street railways seems to be immaterial as long as it does not interfere with the otherwise proper use of the street: *Taylor v. Portsmouth etc. Ry.*, 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560. Hence, it is said that the authorized use of a public street for street railway purposes, no matter what the motor power may be, is not an additional servitude: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763, 23 Atl. 884. Consequently, the use of steam motors on street railways are held to constitute no additional burden: *Briggs v. Lewiston etc. Ry.*, 79 Me. 363, 1 Am. St. Rep. 316, 10 Atl. 47; *Nichols v. Ann Arbor etc. Ry.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Newell v. Minneapolis etc. Ry. Co.*, 35 Minn. 112, 59 Am. Rep. 303, 27 N. W. 839; *Williams v. City Electric St. R. Co.*, 41 Fed. 556. But see *Street Ry. Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933, 13 S. W. 936, 9 L. R. A. 100, to the contrary effect.

Likewise the use of electric motors as a means of propulsion does not create an additional servitude: *La Crosse City Ry. v. Higbee*, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

Hence, it is held that a street railway company which has been using animal power in the operation of its cars may change to electric power without creating an additional servitude: See monographic note to *Western etc. Co. v. Street R. Co.*, 25 Am. St. Rep. 479.

C. Change of Tracks from Narrow to Standard Gauge, or of the Form of Rail in Use.—The fact that heavier trains are used and that the track is changed from a narrow to a standard gauge does not entitle the abutting owner to further damages: *Kakeldy v. Columbia etc. Co.* (Wash.), 80 Pac. 205.

And where the charter of a street railway company is silent as to the kind of rail to be used, it is not confined to the use of the kind of rail generally adopted and used at the time when its charter was granted, but may adopt another and improved form of rail when by so doing it does not impose an additional burden upon the street or city: *Easton etc. Ry. Co. v. Easton*, 133 Pa. St. 505, 19 Am. St. Rep. 658, 19 Atl. 486. In some of the cases the use of what is commonly called a T rail has been considered as tending to create an additional burden upon the street or highway on account of making it difficult or dangerous to pass and repass the street or highway: See *Nichols v. Ann Arbor etc. Ry.*, 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; *Schaaf v. Cleveland etc. Co.*, 66 Ohio St. 215, 64 N. E. 145.

D. Allowing Use of Tracks by Another Railroad.—It seems that the grant by one railroad to another of the right to use its right of way for railroad purposes does not create an additional servitude: *Miller v. Green Bay etc. Ry. Co.*, 59 Minn. 169, 60 N. W. 1006. But see, also, *Fort Worth etc. Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180. And, also, see the monographic note to *Western etc. Co. v. Street R. Co.*, 25 Am. St. Rep. 477.

E. Laying of Additional Railroad Tracks.—The authorities are apparently not harmonious on the question whether the laying of additional tracks will constitute an additional servitude. Thus, it has been held that the laying of additional tracks by a steam railroad will constitute an additional servitude: *Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545; *Davenport Bridge Ry. Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497; *Rock Island etc. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 549; *Stephens v. New York etc. R. Co.*, 175 N. Y. 72, 67 N. E. 119. And it has also been held that the laying of an additional track will not necessarily create an additional servitude: *Davis v. Chicago etc. R. Co.*, 46 Iowa, 389. But it has also been held that the laying of an additional track by another company will entitle the abutting lot owner to additional damages, although compensated previously by another railroad: *Southern Pacific R. Co. v. Reed*, 41 Cal. 256.

On the other hand, it seems that an authorized conversion of a single track horsecar line into a double track electric line will not be deemed to create an additional servitude: *Reid v. Norfolk City R. Co.*, 94 Va. 117, 64 Am. St. Rep. 708, 26 S. E. 428, 36 L. R. A. 274. And it has even been held that the laying by a street railway company of a double track along a street so narrow that there will not

be room for vehicles between the tracks and the curb will not constitute an additional servitude where the quicker transit afforded will outweigh the inconveniences from the use of the double tracks and the value of the abutting property will be increased: *Poole v. Falls Road Electric Ry. Co.*, 88 Md. 533, 41 Atl. 1069. In the case just cited the court in giving the reasons for its decision, said: "The rights of persons passing along the street on foot or with horses or in vehicles will be the same as before. Cars cannot be permitted to stand on the tracks in such manner as to prevent carriages and carts from passing. It will not be impossible for vehicles to be kept standing at the curb as long as may be reasonable for the purpose of unloading or loading their burdens or for discharging passengers. There may be some inconvenience at times but not greater than often occurs in crowded thoroughfares." But the question seems to be one dependent upon the particular facts of each case. In *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah, 31, 33 Pac. 29, 24 L. R. A. 610, the controversy arose over an attempt to lay a third track. The court said: "The tracks already upon said street afford ample facilities to run all the cars necessary for public convenience; and the construction of the third track would be a serious impediment to the ordinary mode of travel, as it would not leave sufficient space between the outside rails and the gutter for vehicles to pass each other with safety. Where the track privileges of one company on a city street are sufficient for the business of two or more companies, they should all be required to use them in common. The construction of an additional track, under the circumstances of this case, would be an unnecessary obstruction to and interference with the ordinary use of the street, and a special injury to the property rights of the abutters, and on proper application a court of chancery may grant injunctive relief."

If a street railway which has been authorized to build a single or double track, constructs a single track, it is not precluded from later on changing to a double track, even though it has maintained a single track for many years: *Ransom v. Citizens' Ry. Co.*, 104 Mo. 375, 16 S. W. 416.

F. Use by Electric Railway Company of Additional Poles for Transmission of Light and Power.—It seems that the transmission of electric heat, light and power on the poles of a street railway, or the addition of another system of poles and wires to also transmit electric heat, light and power, is an additional servitude: *Goddard v. Chicago etc. Ry. Co.*, 104 Ill. App. 526.

3. Telegraph, Telephone or Electric Lighting Systems.

A. Distinction Between Trolley and Telegraph Systems.—In *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859, which was a suit involving the use of a street by an electric street railway, the court laid down the rule that the use to be made of the street

was the test whether it created an additional servitude, and not the motive power to be employed. It illustrated the rule by saying: "And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude upon the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement." Substantially the same illustration was used by the court in *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668, 9 Atl. 326, 7 L. R. A. 205.

B. Telegraph and Telephone Lines.—Although there is still a conflict of authority, it seems that the weight of authority sustains the rule that a telegraph or telephone line along a public street or highway is no part of the equipment of the street, and performs no functions of a street or highway, and hence that such lines constitute an additional servitude, but it also seems that the authorities sustaining the contrary view are gaining in number and also in the force of the reasoning in support thereof, on account of the strong tendency of the courts to extend the functions of streets and highways in decisions respecting the operation of other public utilities on streets and highways. The earlier authorities and the reasoning of the courts were exhaustively considered in the monographic note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229-236, on the subject of "Telegraph and Telephone Poles and Wires in Streets and Highways," the monographic note on the "Law of the Telephone," attached to *Central Union Tel. Co. v. Falley*, 10 Am. St. Rep. 128-136; and also in the notes to *Vanderslip v. Grand Rapids*, 16 Am. St. Rep. 614, and *McCormick v. District of Columbia*, 54 Am. Rep. 290.

The arguments used in the more recent cases affecting this subject were shown by the court in *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298, wherein the court said: "On the general proposition of whether wires and poles are an additional burden for which the abutting owner is entitled to compensation, there is, as stated, a wide divergence of opinion among text-writers and courts. It is universally admitted that the legislature may subject the highway to this use. The question is whether it can be done without compensation to the owner of abutting land. As stated in *Keasbey on Electric Wires*, 71, the argument on one side is that the easement of highway is intercommunication, or the right to use the highway by the public generally for the pur-

poses of intercommunication. Its purpose has been the transmission of intelligence, as well as for travel and transportation. It has been used by the posthorse and mail wagon as well as the coach and cart. When new modes of travel and new means of communication become necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use, and if the old use remains unimpaired, the owner of the soil has no reason to complain. Some of the leading cases supporting this view are here noted: *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Irwin v. Great Southern T. Co.*, 37 La. Ann. 63; *Cater v. Northwestern Tel. Ex. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310; *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *People v. Eaton*, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; *Hershfield v. Rocky Mountain B. T. Co.*, 12 Mont. 102, 29 Pac. 883; *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. 951, 40 L. R. A. 370. "On the other hand, it is argued that the streets were intended primarily for travel and transportation, and that, although they were intended also for the transmission of intelligence, and the telephone and telegraph are used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the land owner ever contemplated such use and occupation. He has only given the right of use for a public highway, and if he cannot complain of this permanent occupation, there is nothing to prevent the posts being put so as to form a barrier between his land and the street and the wires from being so numerous as to be annoying and dangerous. The primary law of the highway is motion, and whether vehicles are used or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under it, but cannot permanently appropriate any part of it. The authorities supporting this view are so numerous that it may be said with confidence that the great weight of judicial opinion is in its favor. We note the following cases: *Eels v. American T. & T. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Board of Trade T. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Postal T. C. Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; *American T. & T. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 106; *Chesapeake & P. T. Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; *Blashfield v. Empire State T. & T. Co.*, 71 Hun, 532, 24 N. Y. Supp. 1006; *Smith v. Central Dist. P. & T. Co.*, 2 Ohio C. C. 259; *Stowers v. Postal T. C. Co.*, 68 Miss. 559, 24 Am. St. Rep. 290, 9 South. 356, 12 L. R. A. 864; *Pacific Postal T. C. Co. v. Irvine*, 49 Fed. 113; *Nicoll v. New York & N. J. T. Co.*, 62 N. J. L.

733, 72 Am. St. Rep. 666, 42 Atl. 583; Hewett v. Western Union T. Co., 13 Wash. L. Rep. 466 (4 Mackey, 424). See Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246, 2 Atl. 105; Browne v. New York & N. T. T. Co., 42 N. J. Eq. 141, 7 Atl. 851; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751."

The court, in view of the weight of authority, decided to drop into the ranks of the majority. So, also, in the very recent case of Bronson v. Albion Tel. Co. (Neb.), 93 N. W. 201, the court in holding that telephone poles and wires on streets were additional servitudes cited and reviewed the latest cases on the subject.

And the court in Magee v. Overshine, 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. 951, 40 L. R. A. 370, in holding that the operation of a telephone line upon a street was not an additional servitude, very exhaustively reviewed the leading cases on the subject and advanced many very cogent reasons to meet the usual arguments advanced in support of the contrary rule. The basic argument, however, seemed to be that the telephone reduced the burden of travel upon the street, and was in fact an improved manner of traveling. The court in referring to several decisions involving the use of telegraph lines, seemed to draw a distinction between such lines and telephone lines. In this connection the court observed: "The telegraph, however, has never been employed as a means of interurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly and by persons without special skill. It is more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph."

Among the authorities holding that a telegraph line on a highway is an additional servitude are the following: Union Electric etc. Co. v. Applequist, 104 Ill. App. 517; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. 365, 39 L. R. A. 722; Chesapeake etc. Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; Eels v. Am. Tel. etc. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Daily v. State, 51 Ohio St. 348, 46 Am. St. Rep. 578, 37 N. E. 710, 24 L. R. A. 724; Western Union Tel. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. 106, 8 L. R. A. 429.

And that a telegraph line is an additional servitude to a street, see Stowers v. Postal Tel. Co., 68 Miss. 559, 24 Am. St. Rep. 290, 9 South. 356, 12 L. R. A. 864.

And to the effect that a telephone line on a highway is not an additional servitude, see *McCann v. Johnson County Tel. Co.*, 69 Kan. 210, 76 Pac. 870; *Cumberland Tel. etc. Co., v. Avritt (Ky.)*, 85 S. W. 204; *Cates v. Northwestern Tel. Ex. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310; *Lowther v. Bridgeman (W. Va.)*, 50 S. E. 410.

But as holding to the contrary effect, see *Andrews v. Delhi etc. Tel. Co.*, 66 App. Div. 616, 73 N. Y. Supp. 1129; *Gray v. York State Tel. Co.*, 92 App. Div. 89, 86 N. Y. Supp. 771. And to the effect that a telephone line on a city street is not an additional servitude, see *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Kirby v. Citizens' Tel. Co. (S. Dak.)*, 97 N. W. 3; *Maxwell v. Central District etc. Co.*, 51 W. Va. 121, 41 S. E. 125.

But to the contrary effect, see *Donovan v. Allert*, 11 N. Dak. 289, 95 Am. St. Rep. 720, 91 N. W. 441, 58 L. R. A. 775; *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298.

C. Electric Lighting Systems.—The question whether the poles and wires of an electric light company constituted an additional servitude to a town highway was the issue in *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, and the court held that they were not. The court, in rendering its decision, said: "The care, management and control of the public ways devolve upon the local municipal government in which they are located; and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to which the public ways may be devoted, but, in the case of crowded thoroughfares, a duty devolves upon the municipality of supplying it. In such cases, it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway: *Johnson v. Thompson-Houston Elec. Co.*, 54 Hun, 469, 7 N. Y. Supp. 716; *Consumers' Gas etc. Co. v. Congress Spring Co.*, 61 Hun, 133, 15 N. Y. Supp. 624; *Witcher v. Holland Waterworks Co.*, 66 Hun, 619, 20 N. Y. Supp. 560; affirmed, 142 N. Y. 626, 37 N. E. 565; *Hequembourg v. Dunkirk*, 49 Hun, 550, 2 N. Y. Supp. 447; *Sun Printing etc. Assn. v. New York*, 152 N. Y. 257, 265, 46 N. E. 499, 37 L. R. A. 788; *Van Brunt v. Flatbush*, 128 N. Y. 50, 56, 27 N. E. 973." And, continuing, the court observed: "We are thus brought to a consideration of the difference between urban and rural streets. That there is a distinction between such streets has long been recognized by the authorities; but a careful examination of the cases discloses the fact that the distinction arises out of the necessary requirements of the public in the use made of them." And

further on the court remarked: "Light may not be necessary in an ordinary country highway, and yet there may be country roads in which the travel is so great as to make light a necessity in order to avoid collisions and injuries in the night-time. The inhabitants of our large cities are in a measure supplied with food and other necessities of life from the surrounding country. Scarcely a city can be named in which there will not be found one or more great public highways leading into the country, which, day and night, are thronged with teams transporting the produce of the farm to the markets of the city. Towns, in some instances, have recognized the public necessity, and have caused some of these thoroughfares to be lighted. In many of our towns there are villages of considerable size remaining unincorporated in which lights in the streets would be of great convenience and materially add to the safety of the public. May not towns properly supply these streets and thronged highways with light? If they may, they may properly contract with others to supply the light."

Substantially the same rule was announced by the court in *Gulf etc. Mfg. Co. v. Bowers*, 80 Miss. 570, 32 South. 113. But in *Callen v. Columbia etc. Light Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782, it was declared that the placing by a private lighting company of poles at the curb in a street and the stringing thereon of electric cable lines and wires for the purpose of furnishing light and energy to private takers was a diversion of the street from the purposes to which it was dedicated and a taking of the property of abutting owners within the meaning of the Bill of Rights, and could not be authorized by the city authorities, so as to deprive an abutting owner of the right to compensation.

4. **Bridges, Trestles, Viaducts and Embankments.**—Although the erection of a bridge along a street for the full width may render the means of ingress and egress of abutting lot owners less convenient, still it has been held that it does not constitute a "taking" of property: *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65. But, on the other hand, it has been held that the construction of a railroad bridge across a street and twenty-three feet above its surface is an additional servitude: *Jones v. Erie etc. Co.*, 151 Pa. St. 30, 31 Am. St. Rep. 722, 25 Atl. 134, 17 L. R. A. 758. Though the approaches to a bridge for the purpose of continuing the highway have been held not to constitute an additional servitude: *Willets Mfg. Co. v. Board of Chosen Freeholders*, 62 N. J. L. 95, 40 Atl. 782. So, also, where the approach to a bridge gradually ascended from the material level of the street, it does not impose an additional servitude: *Willis v. Winona*, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. It seems that the approaches to a bridge connecting public highways are considered in nature of a change of grade of the street, even though the bridge be a toll bridge: *Brand v. Multnomah County*, 38 Or. 79, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389. See, also, *Hudson*

v. Cuero Land etc. Co., 47 Tex. 56, 26 Am. Rep. 289. Likewise an authorized erection of a viaduct in a street for the purpose of changing the grade of the street for street purposes is held not a taking of the property of abutting owners without compensation: *Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, 10 South. 457, 14 L. R. A. 370. But where a railroad viaduct ten or twelve feet high was erected in the central part of a street, leaving only a space of twenty-one feet between the viaduct and the property line of the abutting owner and eleven feet between the viaduct and the sidewalk, it was held that the abutting owner was entitled to recover the damages to his right of ingress and egress. In this connection see, also, *Lewis v. New York etc. Co.*, 162 N. Y. 202, 56 N. E. 540, and *Bennett v. Long Island R. Co.*, 181 N. Y. 431, 74 N. E. 418, which arose over a controversy respecting railroad viaducts. But the construction of a street railway with a trestle as viaduct to cross an intersecting thoroughfare was held not an additional servitude in *Winnetka v. Chicago etc. Co.*, 107 Ill. App. 117, affirmed in 204 Ill. 97, 68 N. E. 407.

And where a railroad embankment obstructs a street which affords access to property used for business purposes, the owner may recover the resulting depreciation in the value of his property: *Harrington v. Iowa Central Ry. Co.* (Iowa), 102 N. W. 139. So, also, the abutting owner upon whose land an embankment is extended in widening a highway in order to make suitable approaches to a crossing is entitled to compensation for an additional servitude: *Wead v. St. Johnsbury etc. Co.*, 64 Vt. 52, 24 Atl. 361.

c. Underground Servitudes.

1. **Gas and Water Mains and Pipes.**—The laying of underground gas-pipes in a country highway is said to impose an additional servitude for which compensation must be made to the abutting land owner: *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246, 2 Atl. 105; *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113, 24 N. E. 1066, 8 L. R. A. 602; *Bloomfield etc. Co. v. Calkins*, 62 N. Y. 386. And the same rule has been announced with respect to the laying of pipes in highways for the conveyance of natural gas: *Consumers' Gas Trust Co. v. Hantsinger* (Ind. App.), 39 N. E. 423; *Ward v. Triple State etc. Oil Co.*, 25 Ky. Law Rep. 116, 74 S. W. 709. But see, also, *La Harpe v. Ellen Tp. Gaslight etc. Co.*, 69 Kan. 97, 76 Pac. 448, which sustains a statute regulating such pipes.

With respect to the laying of water-pipes under a highway by a town, it is said that a town acts in the same capacity as a private water company and has no greater rights: *In re Condemnation of Land at Nahant*, 128 Fed. 185. The cases involving the question do not seem to be numerous. It has been held, however, that the laying of water-pipes in a highway is not an additional servitude: *Bishop v. North Adams Fire Dist.*, 167 Mass. 364, 45 N. E. 925; *Crooke v. Flatbush Waterworks Co.*, 29 Hun, 245; but see, also, *Jayne v. Cortland Waterworks Co.*, 42 Misc. Rep. 263, 86 N. Y. Supp. 571.

On the general subject of underground easements, see the note to *Sterling's Appeal*, 56 Am. Rep. 250.

2. Sewers, Drains, Culverts and Conduits.—The effect of sewers, drains and culverts being to drain the surface waters from the highways, and thus aid in fitting them for advantageous use, they are naturally deemed in aid of the functions of streets and highways; hence, they are held not to constitute additional servitudes: *Lawrence v. Nahant*, 136 Mass. 477; *Lincoln v. Commonwealth*, 164 Mass. 1, 41 N. E. 112; *Warren v. Grand Haven*, 30 Mich. 24; *Van Brunt v. Flatbush*, 59 Hun, 192, 13 N. Y. Supp. 545; *Huddleston v. Eugene*, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444.

And a conduit for telephone wires laid under a street has been held not to constitute an additional servitude: *Coburn v. New Tel. Co.*, 156 Ind. 90, 59 N. E. 324, 52 L. R. A. 671.

On the general subject of underground easements, see, also, subdivision V, c.

3. Subway for Rapid Passenger Transportation.—The construction of a subway for public travel below the surface of a public street imposes no additional servitude on the land owned by the abutting owners: *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577, 69 N. E. 329. The court in rendering its decision respecting this new system of urban transportation, referred to its previous decisions to the effect that the streets were subject to "every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street." It then said: "In the early settlement of the country and in the location of streets in later times, these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced land owners in the largest cities to erect buildings fifteen or twenty stories high, or more, and to excavate under them basements and cellars and sub-cellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the land owner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to in-

clude, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of the abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed, the increase of requirements for business along the streets.

“The legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the land owner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable.”

McKINSTER v. SAGER.

[163 Ind. 671, 72 N. E. 854.]

THE PHRASES “Law of the Land” and “Due Process of Law” are identical in import. (p. 273.)

CONSTITUTIONAL LAW.—While the Statement of Principles Contained in a Declaration of Independence have not the force of organic law, yet it is always safe to read the letter of the constitution in the spirit of that declaration. (p. 273.)

CONSTITUTIONAL LAW—Fourteenth Amendment.—The guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising by any of its departments an arbitrary or capricious power over persons or property. (p. 276.)

CONSTITUTIONAL LAW—Limitations upon the Right to Change the Common Law.—The grant of legislative power implies the right to change the common law, particularly with reference to administrative and remedial processes, and, in many respects, uncontrollable discretion exists in the legislative departments to determine what is expedient; but in determining what constitutes due process of law and equality before the law, proper consideration must be given to the ancient landmarks which were established for the protection of private right. (pp. 270, 280.)

CONSTITUTIONAL LAW.—Every Partial or Private Law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional. (p. 280.)

CONSTITUTIONAL LAW—Sales in Bulk Statute.—A statute making it unlawful for any merchant while indebted to any person who has in good faith given him credit for merchandise sold to him, or money to be used in the conduct of his business, to sell his entire stock, or the major part thereof in bulk, and with the intention of ceasing to do business in the same manner and place as theretofore, without first making a full and complete inventory of the merchandise to be sold and a correct schedule of such creditors, and giving them written or printed notice of any such proposed sale, and providing that if such sale be made without complying with such statute, it shall be deemed void as against such creditors and liable to their claims, and if any part of the property is withdrawn by the purchaser, he is personally liable to such creditors to the extent of its value, is in violation of the fourteenth amendment to the constitution of the United States as class legislation, favoring one class of creditors by granting them superior rights, and denying all others the equal protection of the laws. (pp. 280, 281.)

Everroad & Cooper, for the appellant.

John Rynerson, John W. Morgan, Charles W. Smith, John S. Duncan, Henry H. Hornbrook and Albert P. Smith, for the appellee.

672 GILLET, J. Appellee was the plaintiff below. His complaint was based on the provisions of an act of the general assembly approved March 9, 1903 (Acts 1903, p. 276). The record raises the question as to the constitutionality of that act. All of the essential provisions thereof are found in the first section, which, omitting the enacting clause, is as follows: "That it shall be unlawful for any merchant engaged in the buying and selling of merchandise, while he is indebted to any person who has in good faith given him credit for merchandise sold to him and to be used by him in the conduct of his business, or to any person for money loaned to him to be used in the conduct of such business, and which has been actually used in said business, to sell his entire stock of merchandise, in bulk, or to sell the major portion thereof in value in one or more parcels or to one or more persons for the purpose and with the intention of ceasing to conduct said business in the same manner and at the same place as he has theretofore conducted the same, without first making a full and complete inventory of the merchandise so proposed to be sold, in which inventory the values shall be extended at the ruling wholesale market price thereof; and making a full, true and correct schedule of all persons to whom he is indebted for merchandise so sold to him and of all

persons to whom he is indebted for money loaned to him to be used in the conduct of such business, and which has been used therein, stating therein the postoffice address of each of said creditors and the amount owing to each of them; to which inventory and schedule there shall be attached the oath of ⁶⁷³ the seller that the same is true and correct; or if the seller shall assert that he is not indebted to any person of the classes above designated, he shall make an affidavit to that effect and deliver the same to the purchaser with the inventory as hereinafter provided. The seller shall deliver said inventory and schedule to the proposed purchaser and shall retain exact copies thereof in his own possession; the seller and the purchaser shall each preserve such inventory schedule and affidavit for the period of six months after such sale and purchase and the same shall be open to the inspection of the creditors of the seller. Five days before such sale shall be consummated and before the purchaser shall take possession of the merchandise so proposed to be sold the seller and proposed purchaser shall join in giving written or printed notice of the proposed sale and purchase of such merchandise to each of the creditors named in such schedule; such notice may be delivered in person to such creditors or transmitted to them by registered letter through the United States mail by being deposited in the United States postoffice at the place where the seller has heretofore conducted business, or nearest thereto, properly addressed to the respective creditors at the postoffice address given in such schedule, with proper postage affixed; such notice shall state the aggregate value of the merchandise proposed to be sold as shown by such inventory, the consideration to be paid therefor, and the time and manner of making such payment. If said seller shall fail to make such inventory of such merchandise; or if such inventory shall fail to state the true value of said goods as above required; or if said seller shall fail to make such true schedule of creditors as hereinbefore provided, and the purchaser shall have knowledge of the fact; or in event the seller shall assert that there are no debts of the character above specified; if the purchaser shall fail to require the affidavit above provided; or if the seller and purchaser ⁶⁷⁴ shall fail to give each of said creditors named in said schedule the notice above required in the manner above provided; or if such notice shall not correctly state the amount of such merchandise proposed to be sold and the consideration to be paid therefor, and the time and manner of making the same; then and in either of such events such sale shall be deemed fraudulent and void as against the creditors of

such seller on account of merchandise sold to him and money loaned to him to be used in the conduct of said business, and actually used in said business, and the merchandise in the hands of the purchaser, or any part thereof, if it shall be found in his hands, shall be liable to such creditors, and in the event the same or any part thereof shall be withdrawn by said purchaser, then the purchaser himself, personally, shall also be liable to said creditors of such seller to the extent of the value of the merchandise so received by him and thus withdrawn."

In the case of *Sellers v. Hayes* (1904), 163 Ind. 422, 72 N. E. 119, we had occasion to consider the underlying question in this case, but the importance of the principle involved is, as we believe, a sufficient reason for a further opinion upon the subject.

We have little doubt that the act is in violation of our state constitution, but, as we are persuaded that it contravenes the fourteenth amendment to the federal constitution, we prefer to consider the case from that view-point.

After the opening language relative to national citizenship and its rights, the amendment contains the following language: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is settled that the adoption of said provisions did not carry into the framework of our government any new principle. The amendment is merely a check, and, as its terminology and meaning come from and are revealed by the past, we may appropriately (and for an ⁶⁷⁶ especial reason in this case) refer to history in considering the question whether the act before us is in contravention of the amendment.

As was well said by Mr. Justice Story: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people": *Wilkinson v. Leland* (1829), 2 Pet. 627, 658, 7 L. ed. 542. See *State ex rel. Jameson v. Denny* (1889), 118 Ind. 382, and sepa-

rate opinion by Elliott, C. J., p. 400, 21 N. E. 252, 258, 4 L. R. A. 79; *State v. Fox* (1902), 158 Ind. 126, 63 N. E. 19.

There is an absence of high-sounding phrases concerning freedom in Magna Charta, probably for the reason that it was largely declaratory of the fundamental law of England: 1 Blackstone's Commentaries, *127; Coke's Institutes, 2d pt., Proeme. The significance of the instrument depends largely upon the fact that its stipulations were wrung from the hands of an unwilling king, by men with arms in their hands. Hence it is regarded as an historical monument of right, and it is called the palladium of English liberty. The twenty-eighth chapter of Magna Charta, which Blackstone says "alone would have merited the title it bears of Great Charter," provides: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, or will not deny or defer ⁶⁷⁶ to any man, either justice or right." (As it now appears in the Statutes at Large.) Concerning the expression "the law of the land," Lord Coke has pointed out that it was not said in the Great Charter "law and customs of the king of England, lest it might be thought to bind the king only, nor of the people of England, lest it might be thought to bind them only, but that the law might extend to all, it is said by the law of the land, i. e., England": 2 Coke's Institutes, 2d pt., *51.

In the old case of *Nightingale v. Bridges* (1689), 1 Show. *135, it appears that counsel for the plaintiff, in arguing the cause, said that it was a "fundamental rule, that in life, liberty and estate every man who hath not forfeited them, hath such a right that the law allows him to defend, and means for so doing, that if it be violated, it gives an action to redress the wrong and punish the wrongdoer. The law is the highest inheritance which the king hath, for by it the king and all of his subjects are ruled, and if the law were not, there would be neither king nor inheritance. The kings of England have always claimed a monarchy royal, not a monarchy seignoral; 'under the first the subjects are freeman, and have a propriety in their goods, and freehold in their lands, but under the latter they are villains and slaves'; and, my lord, this propriety was not introduced into our land, as the result of princes' edicts, concessions and charters, but was the old fundamental law,

springing from the original frame and constitution of the realm."

As far back as the year 1819, Mr. Justice Johnson said, in *Bank of Columbia v. Okely*, 4 Wheat. 235, 244, 4 L. ed. 559: "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained ⁶⁷⁷ by the established principles of private rights and distributive justice."

It is well settled that under the modern law the phrases "law of the land" and "due process of law" are identical in import: *Murray v. Hoboken Land etc. Co.* (1855), 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans* (1877), 96 U. S. 97, 24 L. ed. 616; *Hurtado v. California* (1883), 110 U. S. 516, 28 L. ed. 232; *Cooley's Constitutional Limitations*, 7th ed., 502; *Pomeroy's Constitutional Law*, 3d ed., sec. 245.

It was said by Mr. Justice Brewer, speaking as the organ of the court in *Gulf etc. R. Co. v. Ellis* (1897), 165 U. S. 150, 159, 17 Sup. Ct. Rep. 255, 41 L. ed. 666: "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." There is no doubt that the words, "life, liberty and property," as used in both the fifth and fourteenth amendments, were used as representative terms: *Story on the Constitution*, 4th ed., sec. 1950. Of these words, liberty is undoubtedly the most comprehensive. "In a general way," says an authoritative writer, "it may here be stated as an explanation—not offered as a definition

—that when the term ‘civil liberty’ is used, there is now always meant a ⁶⁷⁸ high degree of mutually guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men or by all the members of a state, together with an effectual share in the making and administration of the laws as the best apparatus to secure that protection, and constituting the most dignified government of men who are conscious of their rights and of the destiny of humanity. We understand by civil liberty not only the absence of individual restraint, but liberty within the social system and political organism—a combination of principles and laws which acknowledge, protect and favor the dignity of man.” And again that writer says: “We come thus to the conclusion that liberty, applied to political man, practically means, in the main, protection or checks against undue interference, whether this be from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guaranties of undisturbed legitimate action, and the most efficient checks against undue interference”: Lieber on Civil Liberty and Self-Government, Woolsey’s 3d ed., 24, 29.

“The third absolute right, inherent in every Englishman,” says Blackstone, in 1 Commentaries, *138, “is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.” Writing in a more philosophical spirit, Kent thus expresses himself: “There have been modern theorists who have considered separate and exclusive property, and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed on mankind for the purpose of rousing them from sloth, and stimulating them to action; and so long as the right of acquisition is exercised in conformity to the social relations, ⁶⁷⁹ and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of

the benevolent affections": 2 Kent's Commentaries, 13th ed., *319.

It was said in *People v. Gillson* (1889), 109 N. Y. 389, 398, 4 Am. St. Rep. 465, 17 N. E. 343: "The term 'liberty' as used in the constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." It is not every equal law which is a just law, but, within limits, it may be said that equality is an attribute of liberty. In pronouncing the opinion of the court in *United States v. Cruikshank* (1875), 92 U. S. 542, 555, 23 L. ed. 588, Mr. Chief Justice Waite made use of the following language: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power." It was said in *Yick Wo v. Hopkins* (1885), 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, that the guaranty of the equal protection of the laws is a pledge of the protection of equal laws.

The guaranties found in the fourteenth amendment with respect to life, liberty, property and equality are not to be treated as amounting to a composite, yet, taken together, they clearly evince the general purpose of the limitations. There seems to have been something of this view in the mind of the federal supreme court when it said in *Barbier v. Connolly* (1885), 113 U. S. 27, 31, 5 Sup. Ct. Rep. 357, ⁶⁸⁰ 28 L. ed. 923: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens

should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The effect of the guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising, by any of its departments, arbitrary and capricious power over persons or property: *Ex parte Virginia* (1879), 100 U. S. 339, 25 L. ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; *Dent v. West Virginia* (1888), 129 U. S. 114, 9 Sup. Ct. Rep. 231, 32 L. ed. 623; *Duncan v. Missouri* (1894), 152 U. S. 377, 14 Sup. Ct. Rep. 570, 38 L. ed. 485; *Gulf etc. R. Co. v. Ellis* (1897), 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666; *Holden v. Hardy* (1898), 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780. The law of the land or due process of law cannot be taken to be the very act of legislation which wantonly deprives a person of his rights: *Wynehamer v. People* (1856), 13 N. Y. 378. In *Loan Assn. v. Topeka* (1874), 20 Wall. 655, 662, 22 L. ^{ed.} ed. 455, Mr. Justice Miller declared that there are rights in every free government which are beyond the control of the state, and, in continuing, the learned judge said: "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many": See, also, *De Tocqueville on Democracy in America*, 282.

We recognize to the full the doctrine declared in *Missouri v. Lewis* (1879), 101 U. S. 22, 25 L. ed. 989, with reference to the extent of the authority to classify; but for the very reason that the amendment was designed to protect persons against the exercise of arbitrary and capricious power by any of the departments of state government, a legislature cannot enact a law which creates burdensome and invidious distinctions among persons who are subject to the jurisdiction of the state. The lines on which an enactment is built should have some relevancy

to the subject matter. "Arbitrary selection can never be justified by calling it classification": *Gulf etc. R. Co. v. Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. Rep. 255, 41 L. ed. 666; *Cotting v. Kansas City Stock Yards Co.* (1901), 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92; *Connolly v. Union Sewer Pipe Co.* (1902), 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679.

It is with these preliminary considerations that we take up the discussion of the effect of the enactment in controversy. An examination of section 1 reveals the fact that it was the legislative purpose to provide a remedy for only two ⁶⁸² classes of creditors, namely, those who have in good faith given the merchant credit for merchandise sold to him, and persons who have loaned money to him; it being required that the merchandise or money should be for use in conducting the business, and that it should have been actually used for that purpose. It is also made manifest, by the latter part of the section, that it was the purpose to subject the stock remaining in the hands of the vendee to the payment of said two classes of creditors, and, for the same purpose, to render the vendee liable to them for the proceeds of intermediate sales. Considering the provision of the section that the sale shall be void as to such creditors, and the further provision that the merchandise shall be liable to them, and indulging the undoubted presumption that it was not intended that the vendee should be twice liable for the proceeds of intervening sales—once to such creditors, "to the extent of the value of the merchandise" disposed of by him, and once to general creditors who might in certain circumstances hold him liable—it is evident that one of the purposes of the enactment was, in practical effect, to cut off the right of general creditors to avoid the conveyance as actually fraudulent. But this consideration might be passed over, and the case disposed of on another ground, if, in the attempt to grant a remedy to set aside the conveyance although fraud did not exist in fact, the enactment is vicious in respect to the classification of creditors.

Counsel for appellee attempt to defend the classification by the claim that there is an essential unity about a business, and that it is within the range of the legislative discretion to determine that those who have contributed to build it up, by extending to it credit, shall alone be entitled to subject the stock to the payment of their debts; and, as a part of the contention suggested, appellee's counsel state that the act can be upheld on the same principle on which materialmen's liens and certain

other statutory liens are allowed. The act in question does not proceed on the theory ⁶⁸³ of confusion of goods. On the contrary, its terms are so general with reference to the rights attempted to be granted that it is immaterial whether any stock remains at the time of the sale that can be identified as having been unpaid for. So far as the act is concerned, it makes no difference for what length of time the debt of a favored creditor has remained unpaid. After merchandise sold or money loaned has not only passed into the corpus of the debtor's estate, but can no longer be traced, what natural equity has a person who sold the goods or made the loan to a preference as against general creditors? It is to be recollected that money or goods obtained by a merchant ordinarily becomes in a short time indistinguishable, and that such an asset is not a constant quantity, since it is subject to all the mutations of the business.

In all ordinary cases the proceeds of a particular sale finds its way into the merchant's cash drawer, and is ultimately deposited to the credit of his general bank account—an account which is checked against for the payment of his business obligations, and also to pay for multifarious outside needs. In many instances it would no more be possible to trace the benefit conferred by the credit, and determine how much of it was continued in the business and how much of it was dissipated in the business or was otherwise expended, or to determine whether it was the proceeds of that credit (perhaps remotely given), or was the business energy of the merchant or of his employes, transmuted into money, which had on a particular day produced a favorable balance in his bank account, than it would be to separate the waters of two rivulets at a point below their confluence. In fact, it is evident that a benefit conferred upon a merchant by extending him a credit will ordinarily and in a short time become, with the other influences, direct and indirect, which have contributed to build up the business, so profoundly ingrained with his own property that it is scarcely a figure of speech to say that the union is chemical. ⁶⁸⁴ Why, then, should the classes of creditors described in the statute have an equity to take all, as against the various employes engaged in transacting the business, as against the owner of the building so used, or even as against those who have supplied the creature needs of the merchant and his family while he was engaged in the prosecution of the business? Suppose that, in point of fact, the amount realized by a merchant on a sale of goods purchased by him on credit could be shown to have been

used by him in the purchase of groceries for his family, and that during some other portion of the time of his business endeavor he had incurred a debt in supplying his family with necessary groceries; can any reason be suggested why, as to the stock on hand at the time of a sale in bulk, the wholesaler should be entitled to his pay in full as against the grocer, when neither of them had contributed to the stock as it was at the time of the failure? In considering the demand of favored creditors that they be permitted to appropriate all of the stock, the fact must not be forgotten that in all ordinary cases the merchant has contributed to the business from his general estate, and that other persons are often his creditors for money loaned by them which was used in the business, although such lenders are not such as are described in the statute. But it is unnecessary to particularize further. It seems to us that it must be apparent that, after the point is fairly passed where the proceeds of goods sold or of money loaned can be directly traced, there is no estimating the force of the currents within and without the business, which have directly or indirectly contributed to build up the stock. Such a case is comparable to the fall of darkness, when all objects are indistinguishable.

We perceive no resemblance between such a right as the act in question attempts to confer and the lien given by statute to a materialman. The latter right is in the nature of a *jus in re*; it is based on what is a fair assumption that the property is benefited to the extent of the materials bestowed ⁶⁸⁵ upon it, that the property is a unit, that it is not expedient that the materials should be removed, and, lastly, the notice of record is a warning to all the world that may in principle be likened to the possession of a *bailea*.

Although general liens bear some resemblance to the rights attempted to be granted by the statute in question, yet the difference is vital, and such liens, which are only rights of detention, find their justification largely in their ancient character and in usage, which implies a tacit agreement between the parties. It was laid down by Lord Ellenborough, in *Rushforth v. Hadfield* (1806), 7 East, 224, that attempts to enforce general liens beyond settled usages are not to be encouraged, since to establish a new right of that character would be to encroach upon the common law. Of course the grant of legislative power implies a right to change the common law, particularly with reference to administrative and remedial processes, and a large, and in many respects uncontrollable, discretion, exists in the

legislative department to determine what is expedient; but, in determining what constitutes due process of law and equality before the law, proper consideration must be given to the ancient landmarks which were established for the protection of private right: Cooley's Constitutional Limitations, 7th ed., 505; Maxwell v. Dow (1900), 176 U. S. 581, 20 Sup. Ct. Rep. 448, 44 L. ed. 597; Hurtado v. California (1884), 110 U. S. 516, 4 Sup. Ct. Rep. 292, 28 L. ed. 232.

In its last analysis, the act is objectionable in that its classification as to the remedy of an action is too narrow, and in that it attempts, in effect, at least, to give the members of the favored class a preference on execution. The doctrine has been sanctioned by the supreme court of the United States that "every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void": Cotting v. Kansas City Stock Yards Co. (1901), 183 U. S. 79, 22 ~~686~~ Sup. Ct. Rep. 30, 46 L. ed. 92. See, also, Cooley's Constitutional Limitations, 7th ed., 559. As to the feature of the enactment which subjects the stock to the full payment of the debts of the preferred classes of creditors, it must be said that the enactment is in derogation of the fundamental right of equality before the law. It was said by Marshall, C. J., in United States v. Nourse (1835), 9 Pet. 8, 27, 9 L. ed. 31: "An execution is the end of the law. It gives the successful party the fruits of his judgment." We have reasoned in vain, if it does not yet appear that this statute, calculated as it is unwarrantably to deny to creditors the ancient common-law right to collect their debts by process of execution, thus forbidding to them the authority to reclaim their own, unnecessarily hampering their movements within the social organism, and making of them a proscribed class, large though it may be, is unconstitutional and void. If there is one occasion more than another which calls upon a court to vindicate the fundamental law, it is upon the complaint of a suitor who shows that there has been an attempt by hostile and discriminative legislation to bar his right to the ultimate process of the court, for such enactments strike at the very root of justice.

There is, and always will be, in every representative government, a struggle going on between the various interests of society with reference to legislation. This but evinces the necessity for the existence of a co-ordinate department of govern-

ment, also acting under the responsibility of an oath, to determine, when called on to enforce legislation, whether it operates unequally. Hamilton declared that "it is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit": 51 Federalist.

⁶⁸⁷ In concluding this opinion, we are impressed with the fact that the following language, used by Mr. Justice Cooley in deciding the case of *People v. Township Board* (1870), 20 Mich. 452, 486, 4 Am. Rep. 400, is most apposite: "But the discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

Judgment reversed, with a direction to sustain appellant's demurrer to each paragraph of the complaint.

The Constitutionality of Statutes regulating the sale of goods in bulk is discussed in *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322; *Black v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, and note. As to the effect of a sale made in violation of such statutes, and the remedies of creditors in such a case, see *Rothchild Brothers v. Trewella*, 36 Wash. 679, 104 Am. St. Rep. 973; *Kohn v. Fishbach*, 36 Wash. 69, 104 Am. St. Rep. 941.

CASES
IN THE
SUPREME COURT
OF
IOWA.

REW v. INDEPENDENT SCHOOL DISTRICT.

[125 Iowa, 28, 98 N. W. 802.]

RES JUDICATA.—A Judgment of One Court is conclusive in another in an action between the same parties not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action; and not only as to those matters expressly determined, but also as to those matters collaterally involved and necessarily determined in reaching the final judgment. (p. 284.)

RES JUDICATA—Bonds and Coupons—Conclusion of Law.—If an action has been brought in a federal court on coupons attached to bonds issued by a school district, and it has been adjudged, as a legal conclusion, that recitals in the bonds estop the district from showing that there were no valid judgments which the proceeds of the bonds were or could have been used to extinguish, a state court, in an action on the bonds between the same parties on the same state of facts, is precluded from reaching a different conclusion. (pp. 286, 287.)

INTEREST—Rate After Maturity.—The statutory rule in Iowa that the rate of interest fixed in a contract prevails after maturity as well as before, has no application to a stipulation for semi-annual payments. (p. 290.)

APPEAL—Direction to Enter Judgment.—If the facts are sufficiently found by the trial court, and the conclusion reached was the result of an erroneous application of the law to the findings of fact, the appellate court may, upon a reversal, direct the lower court to enter judgment without a retrial. (p. 291.)

Action on negotiable school district bonds. The plaintiff became the holder of the bonds for a valuable consideration after maturity, having acquired them from persons to whom they had been transferred before maturity for value and without notice of any defense thereto. It was contended by the defendant that although the bonds purported to have been issued to refund a valid indebtedness against the district in accordance with chapter

51, page 43 of the Acts of the Eighteenth General Assembly, and contained recitals, which, if true, would render them valid as a matter of fact, the valid indebtedness of the district was less than one thousand dollars; that no part of the proceeds from the sale of the bonds was used to pay any judgment indebtedness; and that the district was, at the time, indebted to the constitutional limit, and could not legally issue bonds, except to refund a valid indebtedness. In reply the plaintiff pleaded a judgment in the United States circuit court between the same parties in an action on interest-bearing coupons attached to the bonds, that the coupons were valid, and that the defenses interposed in this action, which were also interposed in the action in the circuit court, were not good. The court found against the plaintiff on the estoppel pleaded in his reply and in favor of the defendant on the matters of defense set up, and rendered judgment for the defendant, from which the plaintiff appealed.

Hubbard & Burgess, for the appellant.

Marks & Mould, for the appellee.

80 **McCLAIN, J.** The principal question for determination on this appeal is whether the judgment of the circuit court of the United States in favor of plaintiff in his action on the interest coupons executed and transferred in connection with and as a part of these bonds constituted an estoppel as against the defendant to interpose defenses to the bonds which were interposed in the federal court in the action on the coupons, and which were adjudged in that court to be insufficient; for, although the appellant contends that such defenses would have been insufficient if interposed by the defendant for the first time in the state court, there is some countenance, at least, in our previous decisions, for the contention of appellee, that on the merits of the defenses interposed the decision in the lower court should have been for the appellee, and we will therefore proceed to consider the correctness of the conclusion reached by the lower court as to the estoppel pleaded by plaintiff.

The action in the federal court, in which judgment was finally rendered for plaintiff on the coupons, was originally brought on the bonds and coupons, each bond and the coupons attached thereto being set up as an independent cause of action in a separate count of the petition. The defendant pleaded in abatement to the various causes of action thus set up that the bonds, being assignable instruments made by a corporation, not

payable to bearer, could not be sued on in the federal court by this plaintiff, inasmuch as such an action could not have been maintained thereon by the original payee (see Act of Congress, Aug. 13, 1888, c. 866, 25 Stats. 434; U. S. Comp. Stats. 1901, p. 508), and the federal court held that this plea in abatement was good so far as the bonds themselves were concerned, but was not good as to the coupons which were payable to bearer, and were therefore within the express exception of the act of Congress just referred to, and the federal court dismissed the action so far as it was founded upon the bonds, but retained jurisdiction thereof as to the coupons, and rendered a judgment ³¹ for the plaintiff which on appeal to the circuit court of appeals was affirmed: *Independent School Dist. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364.

It is not necessary to make an elaborate citation of authorities in support of the general proposition that the decision of a court having jurisdiction of the parties and subject matter is conclusive in another court in an action between the same parties, not only as to the same cause of action, but as to other causes of action involving the right or title asserted and the defenses interposed in the court in which such decision was rendered (see *Watson v. Richardson*, 110 Iowa, 698, 80 Am. St. Rep. 331, 80 N. W. 416, and cases therein cited), and this proposition of law has frequently and uniformly been applied to successive actions on different corporate bonds of the same issue, and to separate actions on such bonds and the coupons executed in connection therewith, and as a part thereof: *Whitaker v. Johnson County*, 12 Iowa, 595; *Aurora City v. West*, 7 Wall. 82, 19 L. ed. 42; *Garden City v. Merchants' & Farmers' Nat. Bank*, 65 Kan. 345, 69 Pac. 325; *Mayor etc. v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324. Nor is the binding effect of the previous adjudication limited to those matters which are expressly determined in the final judgment, but it covers also matters collaterally involved, which are necessarily determined in reaching the final judgment: *National Foundry Works v. Oconto Water Supply Co.*, 183 U. S. 216, 234, 22 Sup. Ct. Rep. 111, 46 L. ed. 157; *Aetna L. Ins. Co. v. Board of Commrs.*, 117 Fed. 82, 54 C. C. A. 468.

Counsel for appellee contend, however, that there are three elements in this case which were not in the case on the coupons decided in the federal court, to wit, notice to the purchaser, failure of consideration, and unconstitutionality of the statute under which the bonds were issued. As to the unconstitutionality of the statute, it is sufficient to say that the decision of

the lower court was not predicated on that ground, for it was found as a matter of law that the statute ³² was constitutional, and, as there is no appeal from that ruling, its correctness is not before us. As we understand counsel, they do not contend that a statute authorizing the refunding of valid indebtedness by a municipal corporation already indebted to the constitutional limit is unconstitutional, but only contend that, as applied to a case where the proceeds of the bonds are not used to extinguish valid indebtedness, and the result, in effect, is that the indebtedness of the corporation is actually increased, such statute is unconstitutional. Their contention therefore amounts to this: that because the proceeds of the bonds were not applied to the extinguishment of a valid indebtedness the bonds were invalid, and this question was presented to the federal court in the action on the coupons, and was necessarily determined by it.

The questions of notice and want of consideration were presented to the federal court by proper pleading, in which the facts on which those defenses are predicated were sufficiently stated and relied on; but the conclusion was reached, both by the circuit judge who tried the case and by the circuit court of appeals which reviewed his decision that these facts were immaterial, because the corporation was estopped by the recital in the bonds that they were issued in pursuance of the refunding statute, and that, in connection with the issuance of the bonds, a resolution was passed by the board of directors of the district township which is referred to in the bonds declaring the existence of judgments against the district township for the payment of which the bonds were authorized to be issued: See *Independent Dist. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364. Therefore it appears that the federal court in the action on the coupons determined conclusively for that case the legal effect of the facts as to notice and want of consideration, holding that the purchaser of the bonds and coupons was not bound to take notice of the fact that there was no valid judgment indebtedness of the district township for ³³ which the bonds could properly be issued, and that the defendant was estopped from interposing such defense.

The ultimate contention of counsel for appellee is, however, that the conclusion of the federal court as to the effect of the recital in the bonds was a mere conclusion of law, and not the determination of a question of fact; and that, while such adjudication is conclusive as to issues of fact presented, it is not binding in a subsequent case as to the conclusions of law reached.

But the authorities relied upon do not support this contention. We are referred to *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195, but the holding in that case was that a judgment in favor of the corporation in an action brought in the state court on certain coupons attached to municipal bonds did not involve the question whether the holders were purchasers for value; that the defense interposed in the case in the state court was a good defense only as to a holder who had not paid value, and that in a subsequent action on other coupons, the holder might show that he was a holder for value without notice, and thus recover, notwithstanding the decision in the previous case. The conclusion of the court is based on the finding that a new question affecting the right of recovery on the coupons was presented in the second case which was not adjudicated in the first. The case of *Nesbit v. Independent School Dist.*, 144 U. S. 610, 12 Sup. Ct. Rep. 746, 36 L. ed. 562, is also relied upon, but is subject to the same explanation, for the court therein holds that the judgment in a former action between the same parties on a different cause of action is an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. The difference between the doctrine announced in those two cases and that relied upon by appellant here is that in those cases, the successive actions not being upon the same identical cause of action, the conclusion reached was binding upon the parties only as to questions litigated, and not as to questions ³⁴ not presented, while the contention here is that, although the subject matter was different, the same questions were presented for adjudication in the second case as had been presented and decided in the first.

The claim that a mere conclusion of law announced by one court with reference to a matter before it is not binding in a subsequent suit between the same parties involving the same matter is plausible only under a superficial conception of the principle of *res judicata*. It is not the finding of facts which constitutes an adjudication, but it is the conclusion of the court as to the effect of those facts determined as matter of law. It is the determination of the issues presented which constitutes the adjudication. That determination may consist principally of findings of fact which lead to the result reached on rules of law which are not disputed as between the parties, or it may consist of conclusions as to disputed questions of law as applied to facts about which there is no controversy leading to the

result announced. Every judgment necessarily involves the application of principles of law to the facts of the case. The dispute between the parties may be as to the facts, or as to the law, or as to both, but the judgment is conclusive as to the entire matter involved, that is, as to the case presented, and not simply as to the particular question in regard to which the parties are in controversy. The federal court decided that the recitals in the bonds estopped the defendant from showing by way of defense that there were no valid judgments which the proceeds of these bonds were or could have been used to extinguish. It therefore determined that the coupons constituted a valid indebtedness notwithstanding the falsity in the recitals. The case brought in the state court involved the identical facts presented to the federal court, and the state court is precluded from reaching a different result as between the same parties on the same state of facts: *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. Rep. 495, 31 L. ed. 411; *Linton v. National L. Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54; *Mayor etc. v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324; *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 48, 18 Sup. Ct. Rep. 18, 42 L. ed. 355; *United States v. California & Oregon Land Co.*, 192 U. S. 355, 24 Sup. Ct. Rep. 266, 48 L. ed. 476.

The supreme court of the United States has recently passed upon this question in *Deposit Bank v. Board of Councilmen*, 191 U. S. 499, 24 Sup. Ct. Rep. 154, 48 L. ed. 276, in which case it is held that a decree of a federal court enjoining the collection of certain taxes based upon an adjudication in the state court between the same parties as to similar taxes for a different year was binding in a subsequent suit between the same parties in the state court with relation to the same taxes, although the original decision in the state court had been subsequently reversed on appeal, and the rule had been adopted in the state court that actions on similar taxes for different years did not relate to the same subject matter in the sense that an adjudication of taxes for one year was *res judicata* between the same parties as to similar taxes for another year. In the majority opinion this language is used:

"It is urged that the state judgment upon which the federal decree of 1898 is based was afterward reversed by the highest court of Kentucky, and therefore the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed, based upon a former judgment between the parties, the question

is not what were the reasons upon which the judgment proceeded, but what was the judgment itself. Was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered, which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and reverse the reasons which led the court to ³⁶ make the judgment. In such case nothing would be set at rest by the decree, but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that, because a judgment may have been given for wrong reasons, or has been subsequently reversed, it is any the less effective as an estoppel between the parties while in force."

And the court quotes the following language from *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. Rep. 905, 42 L. ed. 202: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends, has under identical circumstances and conditions, been previously concluded by a judgment between the parties and their privies. This is the elemental rule stated in the text-books, and enforced by many decisions of this court."

The minority in the *Deposit Bank* case reaches the conclusion that the effect of the judgment in the federal court was to be determined according to the state law; and that, as the state courts had reached the conclusion, at the time the federal judgment was pleaded, that a judgment with reference to taxes for one year was not conclusive as to the validity of similar taxes for another year, the federal judgment should not be given greater effect than would have been given to the judgment in the state court on which it was based, and

which had been reversed. It will be seen, therefore, that the views of the minority do not support the ³⁷ contention of appellees in the case before us. It is also to be noticed that, if the majority view in that case is sound, the refusal by the courts of this state to give to the judgment in the federal court in the action on the coupons the effect contended for by appellant would give rise to a federal question, for appellant would be in position to contend that the state courts were not giving to the judgment of a federal court the full faith and credit to which it is entitled.

The conclusion we reach that the decision of the federal court as to the validity of the coupons is binding in this action as to the bonds so far as the defenses interposed are the same as those relied on in the federal court, although had the controversy been between different parties, or as to bonds issued at a different time and under different circumstances, our conclusion as to a similar state of facts would have been different from that reached by the federal court, is amply supported by the views which we have recently announced in the case of *Reynolds v. Lyon County*, 121 Iowa, 733, 96 N. W. 1096, but we have not limited the discussion of the questions presented to the applicability of the reasoning in that case, for it has been pending before us on a petition for rehearing while the present case has been under consideration. As we have now, however, denied the application to reconsider the views there expressed, and the opinion in that case now stands as the finally announced conclusion of the court, we deem it proper to cite it as having an important bearing on the question considered.

The trial court found as a fact the amount which plaintiff should recover from defendant if, as a matter of law, he was entitled to judgment in his favor on the bonds sued upon, the finding being that no portion of the principal of said bonds or the interest accruing thereon subsequently to the date of maturity had been paid; and that, assuming the bonds to be valid, there was due and payable thereon, including simple accrued interest on said bonds at the rate of eight per cent per annum, ³⁸ the aggregate sum of nineteen thousand eight hundred and sixty-six dollars and sixty-seven cents as of March 1, 1903. It is contended for appellant that if we find judgment should have been rendered in his favor, we should direct the lower court to compute interest after the maturity of the bonds at the rate specified in said bonds with semi-annual rests. The language of the bonds relied on is, "with interest at the

rate of eight per cent per annum payable semi-annually on the first day of May and November of each year on presentation and surrender of interest coupons hereto attached." It is to be noticed that the lower court allowed interest after the maturity of the bonds at the rate named therein, which is greater than the legal rate fixed where there is no contract, but did not apply the provisions of the bonds as to interest being payable semi-annually. It is settled in this state by statute (Code, sec. 3039) that the rate of interest fixed in the contract applies after maturity as well as before, although there is no express stipulation to that effect. It has been held that this statutory provision does not apply to installments of interest coming due before or at the maturity of the contract, unless the rate of interest on delinquent installments of interest is specified by the contract, but that on such delinquent installments of interest the legal rate fixed by the statute should be allowed: *Preston v. Walker*, 26 Iowa, 205, 96 Am. Dec. 140; *White v. Savery*, 50 Iowa, 515. We are now asked to hold that the stipulation in the contract for semi-annual rests is to be recognized by implication as applicable to the interest allowed by law after the maturity of the contract. But a contrary conclusion is announced in *Aspinwall v. Blake*, 25 Iowa, 319, in which case the following language is used by the court:

"The time when interest upon a contract is due and recoverable may be fixed by the parties thereto, and is under their control; but, if no time be fixed for its payment, it can be recovered only with the debt, and not separately. Yet it is not in fact part of the debt in the sense in which that word is here used. While the debtor's obligation to pay the interest ³⁰ at the maturity of the principal debt may be as great as to pay the principal itself, yet he has contracted to pay interest upon the principal only, and the law will not raise an implied contract binding him to pay interest upon interest after the principal becomes due."

We think that while, under the statute, the rate of interest fixed in the contract continues after maturity by reason of the special provision to that effect, yet the stipulation as to semi-annual rests has no application after maturity, in the absence of express agreement to that effect. See, in further support of this conclusion, *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594. The language of the bonds with reference to semi-annual rests plainly relates only to the interest payments covered by

the coupons. The conclusion of the trial court as to the amount of the recovery is correct.

As the facts are sufficiently found by the trial court, and the conclusion reached was the result of an erroneous application of the rules of law to the findings of fact, we may properly direct the lower court to enter judgment on the facts found without a retrial of the case: *Roberts v. Corbin*, 28 Iowa, 355; *Drefahl v. Tuttle*, 42 Iowa, 177; *Union Mercantile Co. v. Chandler*, 90 Iowa, 650, 57 N. W. 595; *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28 L. ed. 636. Therefore, the case is remanded to the lower court, with direction that judgment be rendered in favor of the plaintiff on the findings of fact in accordance with the conclusions of law expressed in this opinion.

Reversed.

The General Rules of Res Judicata are stated in the recent case of *Brack v. Boyd*, 211 Ill. 290, 103 Am. St. Rep. 200, and cases cited in the cross-reference note thereto. The determination of the validity of municipal bonds in an action on interest coupons is conclusive in a subsequent action between the same parties to recover on other coupons attached to the same bonds: *Garden City v. Merchants' etc. Bank*, 65 Kan. 345, 93 Am. St. Rep. 284.

BRADY v. MATTERN.

[125 Iowa, 158, 100 N. W. 358.]

CLASS LEGISLATION—Building and Loan Associations.—The legislature has power to limit the right to conduct the building and loan business to incorporated associations. (pp. 296, 297.)

CLASS LEGISLATION—Building and Loan Associations.—A statute which requires unincorporated associations, partnerships, and individuals conducting the building and loan business, to deposit securities representing fifty thousand dollars with the auditor of the state, as a condition precedent to the right to do business, which authorizes the auditor to require such additional securities as he may deem necessary, and which gives the executive council authority to approve the plan or method of doing business, such conditions being imposed upon incorporated associations, does not make an unreasonable discrimination. (p. 299.)

MONOPOLY—Building and Loan Associations.—The fact that a statute imposes such conditions on the right to conduct the building and loan business as to make it impossible for some persons or associations to engage in it, does not render the statute unconstitutional as creating a monopoly in those who are able to comply with the conditions. (p. 299.)

DELEGATION OF LEGISLATIVE POWER—Building and Loan Associations.—A statute which authorizes the state auditor to require unincorporated building and loan associations to make such additional deposits of securities as he may deem necessary, and which authorizes the executive council to pass upon the plans and methods of the association, is not unconstitutional as delegating legislative authority. (p. 300.)

IMPAIRMENT OF OBLIGATION.—If a Statute, in its application, is found to impair the obligation of a contract, it may be declared inoperative as to such contract, without holding it unconstitutional in other respects. (p. 300.)

Habeas corpus to secure the release of plaintiff, who was arrested for violating a statute prohibiting agents from soliciting or transacting business for an unincorporated building and loan association which has not complied with the statutory provisions. There was an order of discharge, from which the state appeals.

Charles W. Mullan, attorney general, and Lawrence De Graff, assistant attorney general, for the appellant.

B. A. Younker, for the appellee.

159 **McCLAIN, J.** The trial judge discharged the plaintiff from custody on the ground that the statute which he was charged with violating is unconstitutional, and that is the sole question argued. Without setting out in full the provisions of the Acts of the Twenty-ninth General Assembly, page 45, chapter 77, it is sufficient to say that it is made applicable to all unincorporated organizations, associations, societies, partnerships, or individuals conducting and carrying on a business corresponding, as described, to the business authorized **160** to be carried on by incorporated building and loan associations, as provided and regulated in chapter 13, title 9, of the Code, and chapter 69, page 51, of the Acts of the Twenty-eighth General Assembly, which statutory provisions are by the statute under consideration made to apply, so far as the same can be made applicable, to the unincorporated organizations, associations, partnerships, etc., to which the statute refers. The act, however, imposes a variety of conditions and restrictions on the transacting of such business by unincorporated organizations, associations, partnerships, etc., which are not imposed upon incorporated associations, among which are the conditions and requirements that the unincorporated organizations, associations, partnerships, etc., shall, before transacting any business, submit to the executive council of the state a sworn statement of

resources and liabilities, and deposit with the auditor of state at least fifty thousand dollars of negotiable notes, secured by first mortgages upon real estate in this state, bearing interest at a rate of not less than five per cent per annum, and such further securities as the auditor of state may require; the deposit to be for the protection of members of such organizations, to be held in trust for the purpose of fulfilling and carrying out their contracts with members and persons making periodical payments thereto. It is further provided that on approval of the executive council of the plan or method of business of any such unincorporated organization, association, etc., the auditor of state shall issue a certificate authorizing it to transact business upon the deposit with him of the securities required; that the auditor may at any time make an examination of the association, and may revoke its certificate of authority if it shall be found not to have complied with, or to have violated, any of the conditions imposed; and that any officer, agent, or employé of such association, or any person transacting the business thereof, shall be subject to fine in a sum not exceeding ten thousand dollars, or imprisonment in the penitentiary not exceeding ten years ¹⁶¹ for soliciting, transacting, or attempting to transact any business for any such association which has not procured and does not hold a certificate of authority from the auditor of state to transact business in the state. It is conceded that the petitioner in this case had been soliciting applications and transacting business in this state for a copartnership operating under the name of the Home Co-operative Company of Kansas City, having its principal place of business in Kansas City, Missouri, and engaged in the kind of business described by the statute, without complying with the provision of such statute.

The appellee contends that the statute is unconstitutional, for the following reasons: 1. That it confers upon a class of citizens privileges and immunities which upon the same terms do not belong to all the citizens of the state, and is therefore class legislation, repugnant to section 6 of article 1 and section 30 of article 3 of the state constitution, and to section 1 of amendment 14 to the federal constitution; 2. That the effect of the law is to prohibit individuals and unincorporated bodies from engaging in the building and loan business, which is permitted to corporations, and that it is therefore contrary to sections 1 and 9 of article 1 of the constitution of Iowa, and to section 1 of amendment 14 to the federal constitution; 3.

That the effect of the law is to confer a monopoly of the building and loan business upon corporations, thereby depriving individuals of the common-law right to make contracts, contrary to section 6 of article 1 and section 30 of article 3 of the constitution of Iowa, and section 1 of amendment 14 to the federal constitution; 4. That the law delegates legislative functions to the auditor of state and to the executive council, and thereby violates section 1 of article 3 of the state constitution; 5. That the law impairs the obligation of existing contracts, in violation of the federal and state constitutions. It will be convenient, however, to discuss the questions involved ¹⁶² in the case, as we understand them, in a somewhat different order.

1. It is contended for the appellee that the statute, in effect, prohibits unincorporated associations, partnerships, and individuals from carrying on the business which is permitted to corporations known as "building and loan associations." Prior to the passage of this statute the business of such corporations was regulated by statute, but there was no regulation of such business as conducted by individuals not incorporated; and, under the claim that the statutory regulations now applied to the latter are prohibitory, it is claimed that the statute is unconstitutional, as interfering with the right of individuals to contract and to engage in lawful business.

It will not be necessary to quote the provisions of the state constitution and the fourteenth amendment to the federal constitution relied on to support this contention. They are the usual provisions under which it is held that individuals are guaranteed the right to acquire and own property, to make contracts, and to engage in business enterprises, so long as the public welfare is not infringed. Nor is it necessary, on the other hand, to cite the cases in which it has been held that an act of the legislature will not be declared unconstitutional unless in plain violation of some provision of the constitution, and that the courts will not interfere with the discretion of the legislature in its exercise of the power to provide for the public welfare so long as it keeps within the fair and reasonable scope of its powers. That the legislature may, in the exercise of the police power, regulate and control the carrying on of business which may be injurious to the public if not properly conducted, or may prohibit a business which is essentially injurious to the public, cannot be questioned. The concrete question here involved is whether the legislature may prohibit one class, composed of unincorporated associations, partnerships,

and individuals, from conducting the loan and building association ¹⁶³ business, which is permitted to another class, composed of artificial persons or corporations. It is to be noticed that there is no attempt to absolutely prohibit the carrying on of such business, and the cases involving the constitutional right to engage in a form of business activity not injurious to the public are not in point. The question is as to the right to discriminate between classes by way of regulation of the business. That such discrimination may be made, when based on a reasonable distinction, involving the public welfare, cannot be questioned; and if the distinction between classes is reasonable, and not purely artificial, and the statute is applicable to all who come within the limits of the classification, its constitutionality cannot be questioned.

Now, that there is some authority for making such discrimination has been recognized as to similar forms of business. The building and loan association business is to some extent analogous to the banking business, and, with reference to the latter, statutes limiting it to incorporated associations have been upheld. Thus in *State v. Woodmansee*, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420, it is decided that the prohibition of private banks—that is, banks not operated by corporations as authorized by the laws of the state—is not unconstitutional. The court supports the conclusion reached by quoting as follows from *Morse on Banking*, second edition, page 1: “At common law the right of banking pertains equally to every member of the community. Its free exercise can be restricted only by legislative enactment, but that it legally can be thus restricted has never been questioned. After laws upon the subject have been passed, the business must be undertaken and conducted in strict accordance with all the provisions contained in them. It is not in its nature a corporate franchise, though it may be made such by legislation, and individuals may be prohibited from transacting it, either altogether in all its departments, or partially in any specified ones.” In *State v. Scougal*, 3 S. Dak. 55, 51 N. W. 858, 15 L. R. A. 477, ¹⁶⁴ 44 Am. St. Rep. 756, the court reaches a contrary conclusion on the identical question involved in the North Dakota case, and disapproves of that case, and the language quoted from *Morse* by which it is supported. The business of insurance is in some respects analogous to the building and loan business, and with reference to that it has been held by a divided court in *Commonwealth v. Vrooman*, 164 Pa. St. 306, 44 Am. St. Rep. 603, 30 Atl. 217,

25 L. R. A. 250, that a statute confining such business to corporations is not unconstitutional. Such a statute, it is observed in that case, "does not prohibit the business of insurance, but regulates it. It says to all persons interested: 'If you wish to embark in this business, you must secure a charter of incorporation, so as to subject your business to the visitorial power of the state. If you will not do this, you must not engage in insurance against fire at all.' This is not prohibition of the business for the business is distinctly authorized. It is an effort to bring it under state supervision and control, by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the state will reach them, and the insurance department of the state can supervise their business and compel observance of the law."

In view of this conflict in the authorities as to whether the legislature may require that such forms of business as banking and insurance be carried on only by corporations, we may well consider whether such a discrimination is reasonable. As is said in *Commonwealth v. Vrooman*, 164 Pa. St. 306, 44 Am. St. Rep. 603, 30 Atl. 217, 25 L. R. A. 250, with reference to the business of insurance:

"Corporations derive their existence from the state, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are in fact, required to lay open before the several departments of state government and before the public the character and extent of their business, the profits realized, the dividends declared, and the investments made. . . . ¹⁶⁵ Private individuals are not subject to the same visitorial power. They cannot ordinarily be compelled to disclose their business, their financial conditions, or the character of their investments. They cannot be restricted in the use of either their capital or their profits, as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state may compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations."

This language is peculiarly applicable to building and loan associations. If the association is incorporated, the member, as a stockholder, can ask protection in the courts as against a perversion of funds, the safe management of which is essential to enable the association to carry out, in good faith, its ob-

ligations; but what protection does the individual investor have, as against a partnership or person to whom he pays money under such a contract, save the individual responsibility of the other party to the contract? If the statute which we are now considering is not valid, then such investor has practically no remedy, except an action at law for breach of contract, if the funds to which he has contributed may have been squandered or put beyond his reach. It is hardly necessary to now enter into any discussion of the right and duty of the legislature to regulate the various businesses conducted by banking, insurance, and building and loan associations. Such right and duty have been recognized by legislation in practically all of the states in the Union, and conceding as we must that such legislation is valid—that is, that these various forms of business may properly be regulated by the legislature in the exercise of the police power—we reach the conclusion that it is within the power of a legislature, if, in the exercise of its discretion, it sees fit to so enact, to limit such business to incorporated associations.

2. But it is not necessary to the full disposition of the case before us that we go to the extent indicated in the ¹⁶⁶ preceding division of the opinion in support of the statute. It does not prohibit, either expressly or in effect, the conducting of the building and loan business by unincorporated associations, partnerships and individuals. It imposes conditions upon the latter which are not imposed on corporations engaged in the same business, but, unless the distinction made is unreasonable, it is not to be condemned as class legislation; and the reasonableness of the distinctions made becomes, therefore, a necessary matter of inquiry. No serious objection is made to the provisions of the statute which subject unincorporated associations, partnerships, and individuals conducting the building and loan business to substantially the same supervision as that exercised over incorporated associations; but it is objected that the provision requiring the deposit with the auditor of state of securities representing fifty thousand dollars, and further requirements that the executive council must approve the plan or method of doing business before the certificate may be issued, and that the certificate may be revoked on failure to deposit with the auditor of state such further amount of securities as “in his judgment may thereafter be necessary” to protect the members of such unincorporated associations, or the persons making periodical payments to partner-

ships or individuals carrying on such business, are unreasonable, and constitute an unlawful discrimination, as against such unincorporated associations, partnerships, and individuals. Bearing in mind the distinction indicated in the preceding paragraph between power of control which the state and the members of a corporation, respectively, may exercise over corporate action, and that which may be exercised over individual action, it is by no means clear that, in any view, the requirements of the statute are unreasonable or oppressive, and we are satisfied that they are not so unreasonable and oppressive and impossible of observance that we can make them the justification for holding the statute unconstitutional.

¹⁶⁷ Taking this case for an illustration, we find that the articles of the Home Co-operative Company provide that the person dealing with such company, with a view of taking advantage of the opportunity offered him for procuring a home, is to pay a membership fee of three dollars and one dollar and thirty-five cents each month, one dollar of which is to go to his credit, until he has thus to his credit the sum of fifty dollars, after which time he may be entitled to have an installment in the sum of fifty dollars per month applied on the payment for a home until the sum of one thousand dollars shall in this manner be paid. Until the expiration of fifty months, therefore, from the inception of the contract, the association will simply be his creditor for moneys paid in; and, if the association should start with no more than one thousand members, it would have received fifty thousand dollars from those numbers, without regard to membership fees, reserve funds, or expenses, for which the members would have absolutely no security save that of the liability of the association. Is it unreasonable, then, to require that securities to the extent of fifty thousand dollars, shall be deposited with the auditor of state before the association shall ask to be allowed to solicit members on these terms? It is said that there is no provision by which these securities can be withdrawn, or the interest accruing thereon returned to the association; but, no doubt, the auditor of state would be authorized, under the statute, to release some of the securities, and accept others as a substitute; and if the association should continue to enlarge its membership, as it must do if it is to render its contracts profitable to its members, we are by no means satisfied that the aggregate of the securities, and the increase thereon, which must be in the auditor's custody, will exceed the amount of security which the com-

pany ought to give for the faithful discharge of its contracts to members in this state.

Nor is the authority given to the executive council to pass upon the plan and methods of the association, and to the auditor of state to require additional securities, open to the reasonable objection of unfairness. Conceding, as we ¹⁶⁸ must, that the legislature may dictate the plans and methods upon which the business may be conducted, there is no inherent impropriety in prescribing such plans and methods. Nor is it inherently objectionable that additional securities be required, to correspond to the extent of the business which the association is transacting. It might well be that fifty thousand dollars in securities would be an inadequate guaranty if the business should become extensive.

We reach the conclusion that we would not be justified in holding this statute unconstitutional on the ground that it makes an unreasonable discrimination. Without attempting to cite or exhaustively discuss the cases to which our attention has been called, we deem it sufficient to refer to the following in support of our conclusion that the statute is not unconstitutional on the ground that it amounts to class legislation: *Hawthorn v. People*, 109 Ill. 302; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923; *Gano v. Minneapolis etc. Ry. Co.*, 114 Iowa, 713, 89 Am. St. Rep. 393, 87 N. W. 714, 55 L. R. A. 263; *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388, 24 S. W. 164, 25 L. R. A. 243.

3. What has been already said disposes of the claim made by counsel for appellee that the statute is unconstitutional as conferring a monopoly. The fact that conditions are imposed on a business which is subject to legislative control, such as to make it impossible for some persons or associations to engage in it, is not objectionable, as creating a monopoly in those who are able to comply with the conditions. If the restrictions are reasonable, the fact that some persons are not able to comply with them is no argument against the validity of the statute. This conclusion seems to be sufficiently established by the statement, without the citation of cases. No authorities are cited supporting the proposition that a reasonable restriction upon forms of business which the legislature may, in the exercise of the police power, impose upon classes of business, is objectionable ¹⁶⁹ on this ground. Even if unincorporated associations and individuals were prohibited from engaging in the

building and loan business, so long as the business was open to all corporations complying with the reasonable conditions imposed by statute, no monopoly would be created.

4. It is further contended, however, that the statute is open to the objection that it improperly confers legislative power upon the executive council and the auditor of state. Here, again, we find no authorities which hold that the legislature cannot give to executive officers a discretion in determining the conditions to be imposed on the conduct of a business which is subject to legislative control. The legislature can only pass general statutes. It cannot provide for their application to particular conditions. Discretion may be conferred upon a railroad commission to fix rates of fare or freight: *Georgia R. R. v. Smith*, 70 Ga. 694. The board of supervisors of a county may be given the authority to fix the fees or compensation of officers: *Ryan v. Outagamie County*, 80 Wis. 336, 50 N. W. 340. We see no reason why the legislature cannot authorize the executive council to determine whether the plan and methods in accordance with which the building and loan business is to be conducted by any particular association are fair, reasonable, and in accordance with public policy, or why the state auditor cannot be authorized to fix the amount of securities which an unincorporated association desiring to conduct such business in the state shall deposit for the security of its members. It must be assumed that state officers will act fairly and impartially and in accordance with their best judgment, and statutory provisions allowing them to exercise a discretion in such action are not to be condemned as unconstitutional: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312, 31 Am. St. Rep. 477, 48 N. W. 98, 12 L. R. A. 436.

5. As to the contention that the statute in question impairs the obligation of contracts, it is enough to say that ¹⁷⁰ counsel does not point out any instance in which any valid contract will be impaired by the statute. If, in its application, the statute is found to have such an effect, it may be declared inoperative as to that contract without holding it to be in other respects unconstitutional.

We reach the conclusion, therefore, that the statute in question is not unconstitutional on any of the grounds of objection urged to it, and that the plaintiff should have been retained in custody to answer for any violation of its provisions which may be proven on a proper trial; and the order of the lower court releasing him from custody is reversed.

A State Statute prohibiting the exercise of banking powers by natural persons, and authorizing their exercise by corporations, is held unconstitutional in State v. Scougal, 3 S. Dak. 55, 44 Am. St. Rep. 756. Compare, however, Commonwealth v. Vrooman, 164 Pa. St. 306, 44 Am. St. Rep. 603.

DOWLING & ALLGOOD v. WOOD.

[125 Iowa, 244, 101 N. W. 113.]

EXEMPTION OF WAGES—Estoppel to Assert.—A debtor who induces his creditors to sue on their claim and garnish his personal earnings is estopped from thereafter setting up the exemption of such earnings. (p. 302.)

EXEMPT PROPERTY—Sale of—Joinder of Wife.—Section 2906 of the Iowa code, which requires a mortgage of exempt personal property to be concurred in by the wife, does not prohibit the sale or assignment of exempt property. (p. 302.)

Action, aided by an attachment, to recover an indebtedness. The defendant moved for a release of money attached by garnishment in the hands of the Chicago, Milwaukee & St. Paul Railway Company, on the ground that he was a married man, and that the moneys due him from the railway company were his personal earnings, exempt under section 4011 of the Code. In resistance to this motion it was alleged that the action was brought and the railway company garnished at the defendant's request, and that the expense of the action had been incurred in reliance upon the request.

Giddings & Winegar, for the appellants.

White, Clarke & Clarke, for the appellee.

245 McCLAIN, J. The case presented upon this appeal is simple, though it may not be easy of solution. Code, section 4011, provides that the earnings of a debtor, who is a resident of the state and the head of a family, for his personal services or those of his family, at any time within ninety days next preceding, are exempt. The question is whether the debtor himself may by his act or agreement waive the right subsequently to interpose this exemption in a garnishment proceeding. It is first argued that, as the exemption is to the head of a family, the personal act or agreement of the debtor himself will not be effectual as a waiver thereof depriving the family of the benefit of the exemption. But the difficulty with this conten-

tion is that the debtor may collect his earnings, and dispose of them as he pleases, and no legal reason is readily apparent why he cannot contract with reference to such earnings. It has been held that a contract made at the time the indebtedness is incurred by which exemption is waived as against such indebtedness is invalid, as contrary to public policy: *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543. And there are cases to the effect that a subsequent ²⁴⁶ waiver of exemption is also invalid: *Denny v. White*, 2 Cold. 283, 88 Am. Dec. 596. But we think that the case before us is not controlled by ordinary rules as to waiver of exemption. The defendant had the right to receive the wages for his personal earnings from the railroad company, and apply them to his indebtedness to plaintiff, and, if necessary, he could bring suit against the company and apply the sum realized in such suit to the payment of plaintiff's claim. Or he might, without doubt, have assigned to plaintiffs his claim against the company, thus enabling them to sue as assignees. Instead of doing this, he directed the plaintiffs to bring action on their claim and garnish the company, which was, in effect, instituting action against the company for the benefit of the defendant to recover the amount of the indebtedness of the company to him. It appears from the allegations of the pleadings that defendant had recently been discharged from the employment of the railroad company, and there may have been good reason for his wishing suit to be brought. By persuading plaintiffs to institute action, defendant relieved himself from liability to judgment for costs should the garnishment proceeding be unsuccessful. It is not for us to say that there was no adequate advantage resulting from this arrangement. Having induced the plaintiffs to incur the expense and liability involved in instituting garnishment proceedings, we think that defendant is estopped from setting up the exemption of his earnings as against the plaintiffs' claim. The defendant may well be held to be estopped by his conduct, although a mere waiver of his exemption, or an executory contract to waive it, would be invalid.

There is no merit in the contention that the transaction was, in effect, a mortgage of defendant's exempt personal property, which, under the provision of Code, section 2906, would not be valid unless concurred in by the wife. The statute does not prohibit the sale or assignment of exempt property.

²⁴⁷ The ruling of the trial judge was therefore erroneous, and it is reversed.

Exemption of wages and earnings is discussed generally in the monographic note to *Tabb v. Mallette*, 102 Am. St. Rep. 81-103. On estoppel to claim exemption, see *Boylston v. Rankin*, 114 Ala. 408, 62 Am. St. Rep. 111; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681; and on waiver of exemption, see *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66; *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132; *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. Rep. 763; *Wyman v. Gay*, 90 Me. 136, 60 Am. St. Rep. 238; *Murdy v. Skyles*, 101 Iowa, 549, 63 Am. St. Rep. 411.

ANDERSON v. COWAN.

[125 Iowa, 259, 101 N. W. 92.]

ESTOVERS—Implied Right to.—The right to estovers is an incident to be implied from the mere leasing of a farm. (p. 303.)

ESTOVERS.—The Common Law in respect to estovers is in force in Iowa. (p. 304.)

ESTOVERS are of Three Kinds: 1. Housebote, being a sufficient amount of timber for repairing buildings and burning in the house; 2. Plowbote, for making and repairing implements of husbandry; and 3. Haybote, for repairing hedges and fences. (p. 304.)

ESTOVERS—Fuel.—Dead and Fallen Timber may be burned by a tenant for firewood. (p. 305.)

ESTOVERS—Fuel.—Unless Growing Trees are such as customarily are cut down for firewood, a tenant should not be permitted to make use of them for that purpose. (p. 305.)

Action by a lessor in a five year farm lease to have the lessee enjoined from cutting timber trees for firewood. The petition was dismissed and plaintiff appealed.

Penwick & Anderson, for the appellant.

Stuart & Stuart, for the appellees.

²⁵⁹ LADD, J. The lease contains no reference to the use of timber for firewood, but appellees insist that the right to estovers is an incident to be implied from the mere leasing of the farm, and such was undoubtedly the rule at common law: 1 Wood on Landlord and Tenant, sec. 247; 1 Taylor on Landlord and Tenant, sec. 350. See 18 Am. & Eng. Ency. of Law, 448; *Van Deusen v. Young*, 29 N. Y. 9; *Wright v. Roberts*, 22 Wis. 161; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705. This is conceded, but it is argued that the common of estovers is so out of harmony with the spirit of our institutions that it ought not to be ²⁶⁰ adopted as a part of the law of the state. That

the common law obtains in this state is not questioned, and appellant has not taken the trouble to point out any differences between our situation and that of the people of England which should lead to the rejection of this particular portion of it. Many decisions, in liberally interpreting the rules relating to estovers, have given as a reason therefor the existence of more extensive forests here than in England, and the necessity of reducing the land to cultivation; but we have found none suggesting the rejection of the doctrine entirely as inimical to our institutions. In many of the states woodland is abundant, and cutting it down by a tenant for life or for years has been allowed under circumstances which would be regarded as waste there: Tiedeman on Real Property, 69; Proffitt v. Henderson, 29 Mo. 325; 4 Kent's Commentaries, 76. Mr. Washburn, in his work on Real Property, says that: "In respect to what timber and what trees may be used for firewood, and whether the cutting of trees, though for neither of these uses, would be waste, depends upon the usages of the country, the customary mode of managing lands, and the manner in which the inheritance would be affected by such cutting, rather than the rules of the English common law; the rule here as to waste being that nothing which does not prejudice the inheritance of those who are entitled to the remainder or reversion can be deemed waste": 1 Washburn on Real Property, 128 et seq.

In large portions of this state there were no native forests, and in these innumerable artificial groves have been planted. In others, native timber is found in abundance, and, while not enough in any part to permit of indiscriminate destruction, we cannot say that because of local conditions the common of estover ought not to be regarded as a part of the law of the land. Estovers are of three kinds: 1. Housebote, being a sufficient supply of wood to repair and burn in the house; 2. Plowbote, for making and repairing instruments of husbandry; and 3. Haybote, for ²⁶¹ repairing hedges and fences. The tenant is allowed to cut only for present use on the premises, and not elsewhere, and only such as may be suitable for the purpose. Few, if any, houses in this state have been constructed from native timber and rarely will timber be made use of in the repairs of the house, or in the making instruments of husbandry, or in the repair of fences, save in replacing of posts. The dead and fallen timber is usually of no value save for fuel, and ordinarily the only benefit the tenant obtains from the wood lots is the fuel for his stove. Indeed, it is of little value for any other purpose. This, un-

doubtedly, the tenant may burn as firewood. It is said in Coke on Littleton, 53b, that, if there is sufficient dead wood for fuel, the tenant has no right to cut down growing trees for that purpose, and in *Simmons v. Norton*, 7 Bing. 640, it was held that in felling trees for repairs only those suitable might be taken. According to Blackstone the tenant was not permitted to cut timber trees: See Cooley's Blackstone, 122, 144. And this appears to have been the view of Coke: Coke on Littleton, 53. In *McCullough v. Irvine's Exrs.*, 13 Pa. St. 438, the court held that whether cutting timber will be deemed waste depends on the custom of farmers, the situation of the country, and the value of the timber. If timber trees have been planted, they are presumed to have been placed to meet the special purposes of the owner, as to serve as an ornament to his farm, or as a windbreak for his stock; and in determining whether any may be appropriated by the tenant the use of the owner designed for them is always to be kept in view. Indeed, it may be safely laid down that the main object had in planting an artificial grove is not ordinarily to raise fuel, and that growing trees so planted may not be cut down without the owner's assent. With respect to the native forests we are inclined, because of the conditions in this state, to adhere to the common law more strictly than has been done in other jurisdictions in this country, and, unless growing trees are such as are customarily cut down for firewood, the ²⁶² tenant ought not to be permitted to make use of them for this purpose. In the instant case the defendants cut for fuel, besides the dead and fallen timber, a number of live trees. They were of a kind ordinarily used in that vicinity for fuel, were suitable for that purpose only, and whether their removal worked any injury to the reversion was in dispute. The witnesses were before the court, and, in view of its superior opportunities of weighing the testimony, we are not inclined to interfere with the decree.

Affirmed.

THE LAW OF ESTOVERS IN THE UNITED STATES.

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VIII. Remedies of Parties.

- a. Of the Landlord or Reversioner, 310.
- b. Of the Tenant, 311.

I. Nature of Right to Estovers.

a. In General.—A tenant for years or for life, when not restrained by covenant or agreement, has, as an incident to his estate, a right to take reasonable estovers from the land. Estovers are of three kinds: 1. Housebote, which is the amount of wood or timber necessary for repairing the buildings, and for burning as fuel; 2. Plowbote for making and repairing tools and implements of husbandry; and 3. Haybote, for maintaining and repairing fences and hedges: See the principal case, ante, p. 303; *Harris v. Goslin*, 3 Harr. (Del.) 340; *Chapman v. Epperson Circled Heading Co.*, 101 Ill. App. 161; *Walters v. Hutchins*, 29 Ind. 136; *Hubbard v. Shaw*, 12 Allen, 120; *Wright v. Roberts*, 22 Wis. 161; note to *Miles v. Miles*, 64 Am. Dec. 367. But if he goes beyond this and cuts timber in unreasonable quantities or contrary to the principles of good husbandry, he commits waste: *Jackson v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *Ballentine v. Poyner*, 3 N. C. (2 Hayw.) 110, 268.

b. Common of Estovers, or the common right of tenants to take necessary wood or timber from the woodland of their lord, is of little or no practical importance in this country. There have been a few decisions, however, growing out of the old manors in New York. The leading case on this question is *Van Rensselaer v. Radcliff*, 10 Wend. 639, 25 Am. Dec. 582, where it is decided that common of estovers cannot be apportioned. Other cases are *Livingston v. Ketcham*, 1 Barb. 592; *Leyman v. Abeel*, 16 Johns. 30; *Van Rensselaer v. Brice*, 4 Paige, 174.

II. Custom and Circumstances as Affecting Right.

Whether the cutting of timber by a tenant will be considered waste, or a proper exercise of the right to estovers, depends upon the custom of farmers, the situation of the country, and the value of the timber. The question is one of fact, depending upon the circumstances of each case: See the principal case, ante, p. 303; *Bond v. Lockwood*, 33 Ill. 212; *Brown v. Smith*, 52 Me. 141; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *McCay v. Wait*, 51 Barb. 225; *McCullough v. Irvine*, 13 Pa. St. 438. "Regard must be had to the condition of the premises, and the inquiry should be, Did good husbandry, considered with reference to the custom of the country,

require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed": *Woodward v. Gates*, 38 Ga. 205, 213. "Whether the tenant cut timber unnecessarily upon a claim of so doing for reasonable estovers or for the cultivation of the land, and whether sufficient wood and timber were left for the permanent use of the inheritance, are questions for the decision of the jury": *Warren v. Gans*, 80 Miss. 76, 31 South. 539.

III. Time of Cutting Timber and Making Repairs.

It has been stated that a tenant must cut only such timber as he needs for present or immediate use, and not in anticipation: See the principal case, ante, p. 303; *Zimmerman v. Shreeve*, 59 Md. 357. This language, however, should, in our opinion, receive a reasonable interpretation, for it would seem clear that good husbandry may in many cases demand the cutting of timber in advance of the time when its actual use is contemplated. In an action of waste for cutting timber, the tenant has no right to recoup for improvements which at some time he may have made on the premises: *Morehouse v. Cotheal*, 22 N. J. L. 521.

IV. Character and Abundance or Scarcity of Timber.

a. **Abundance or Scarcity of Timber.**—Whether or not the cutting of trees by a tenant amounts to waste will often depend upon the amount of timber on the premises or in the community. If there is an abundance or a superfluity of timber, of course greater latitude will be given a tenant than where there is a scarcity: *Woodward v. Gates*, 38 Ga. 205; *Proffitt v. Henderson*, 29 Mo. 325; *Crockett v. Crockett*, 2 Ohio St. 181; note to *Miles v. Miles*, 64 Am. Dec. 368. Yet the scarcity of timber does not prevent its use by a tenant for proper purposes, but imposes upon him the duty of being more careful in its use: *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351.

b. **Character of Timber.**—In cutting wood for fuel, a tenant should generally use dead and fallen trees before felling live timber. It is not waste, however, to cut live trees for firewood, if such is the custom of farmers in the vicinity: See the principal case, ante, p. 303; *Padelford v. Padelford*, 7 Pick. 152; *Clarke v. Cummings*, 5 Barb. 339. A tenant is not required to cut fallen or decayed trees for firewood at an expense exceeding their value: *Rutherford v. Aiken*, 2 Thomp. & C. (N. Y.) 281. To remove dead and decaying trees to give the live timber a better opportunity to grow is not waste: *Keeler v. Eastman*, 11 Vt. 293; neither is the removal of timber blown down by a tempest: *Houghton v. Cooper*, 6 B. Mon. 281; *Shult v. Barker*, 12 Serg. & R. 272. See, too, *Stonebaker v. Zollickoffer*, 52 Md. 154, 36 Am. Rep. 364. A tenant who cuts ornamental or shade trees is guilty of waste: *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351; *Clement v. Wheeler*, 25 N. H. 361.

V. Use and Purpose for Which Timber is Out.

a. In General.—In the opening paragraph of this note it was pointed out that the right to estovers comprehends the right on the part of a tenant to cut a reasonable amount of wood and timber from the premises for use as fuel and as repairs for buildings, fences, and farming implements. It is clear he must ordinarily cut only such timber as is adapted to the use for which he takes it. He cannot rightly cut valuable timber for firewood, for this would usually be an unreasonable use of it: *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351; *Zimmerman v. Shreeve*, 59 Md. 357; *Clarke v. Cummings*, 5 Barb. 339.

b. New Improvements.—It is said that a tenant in dower cannot take timber to build new fences where there were none before: *Fuller v. Wason*, 7 N. H. 341. And it has also been thought that a life tenant is not entitled to cut timber to use for the purpose of replacing a building which has been destroyed by an act of God: *Miller v. Shields*, 55 Ind. 71. In *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733, however, it is held that a life tenant may take fuel for a new salt-well put down by him.

c. Other Uses.—Where land is annexed to a furnace, cutting wood for the furnace, such being the ordinary use of the land, is not waste: *Den v. Kinney*, 5 N. J. L. 552. But a tenant has no right, it has been held, to dig up and use the soil and wood on the premises with a view to manufacturing brick for sale: *Livingston v. Reynolds*, 2 Hill, 157. Where there are coal mines opened on the property, he may cut timber to use in mining operations: *Neel v. Neel*, 19 Pa. St. 323. And where there are salt-works on the property, the tenant may cut fuel to use in operating them: *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733. Cutting hoop poles by a tenant is waste, unless that is the ordinary mode of managing the farm, but not otherwise: *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621. It is said to be waste to collect together lightwood and extract tar from it: *Parkins v. Coxe*, 3 N. C. (2 Hayw.) 339, 517. It may not be waste to saw timber into shingles, etc., when that is the only use that can be made of the land: *Ballentine v. Poyner*, 3 N. C. (2 Hayw.) 110, 268. Compare *Proffitt v. Henderson*, 29 Mo. 325.

d. Clearing Land for Cultivation.—It is not waste for a life tenant to cut down wood or timber so as to fit the land for cultivation or pasture, provided this does not damage or diminish the value of the inheritance, and is conformable to the rules of good husbandry; and this is true even when the timber so cut is sold, used, or consumed off the premises: *Proffitt v. Henderson*, 29 Mo. 325; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Jackson v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *People v. Davison*, 4 Barb. 109; *Harden v. Harder*, 26 Barb. 409; *Ward v. Sheppard*, 3 N. C. (2 Hayw.) 283, 2 Am. Dec. 625; *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Lynn's Appeal*, 31 Pa. St.

44, 72 Am. Dec. 721; Owen v. Hyde, 6 Yerg. 334, 27 Am. Dec. 467; Stroebe v. Fehl, 22 Wis. 337; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527, citing numerous cases. But see Clark v. Holden, 7 Gray, 8, 66 Am. Dec. 450.

e. Cutting Timber to Sell or Exchange.

1. **For Mere Profit.**—While a tenant may, when it is good husbandry to clear off timber to prepare land for cultivation, sell the timber so cut, he cannot, as a rule, cut timber merely to sell or dispose of for profit. This applies to both tenants for life and to tenants for years: London v. Warfield, 5 J. J. Marsh. 196; Warren County v. Gans, 80 Miss. 76, 31 South. 539; Learned v. Ogden, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278; Kidd v. Dennison, 6 Barb. 9; Robinson v. Kime, 70 N. Y. 147.

2. **For Obtaining Other Timber.**—So strictly have the rules governing the right to estovers been applied that it has been held waste for a tenant to cut timber trees and sell them in exchange for firewood (Padelford v. Padelford, 7 Pick. 152; Phillips v. Allen, 7 Allen, 115); or to sell in exchange for boards, stakes, and labor for repairing fences (Elliot v. Smith, 2 N. H. 432; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362); or for paying the expense of cutting and conveying fuel to the tenant's house: Johnson v. Johnson, 18 N. H. 594. Justice Story, in Loomis v. Wilbur, 5 Mason, 13, Fed. Cas. No. 8498, in passing upon this question, departed from these stringent rules. He said: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so it would not be purged or its character changed by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were bona fide applied for the purpose in pursuance of the original intention, it does not appear to me to be possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense, that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate." This view of the law is supported by Matter of Williams' Estate, 22 N. Y. Supp. 906, 1 Misc. Rep. 35. See, too, Flener v. Flener, 24 Ky. Law Rep. 723, 69 S. W. 954; King v. Miller, 99 N. C. 583, 6 S. E. 660.

VI. Place Where Timber is Cut or Used.

The right to estovers is usually confined to wood and timber sufficient to supply the estate itself; the tenant cannot, as a rule, carry timber off the premises to use elsewhere: Zimmerman v. Shreeve, 59 Md. 357; White v. Cutter, 17 Pick. 248; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; Van Deusen v. Young, 29 N. Y. 9; Stroebe v. Fehl, 22 Wis. 337. This rule is applied to a tenant by the curtesy in Armstrong v. Wilson, 60 Ill. 226, where it is held waste for a person who,

having curtesy in an eighty acre tract adjoining his own land and in a timber tract adjoining neither, takes timber from the latter tract with which to improve the land which he owns. "The right of the tenant by the curtesy," said the court, "was that of reasonable estovers, which is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used, and consumed upon the estate, or for purposes connected with its proper use, occupancy and enjoyment."

It has been said that to entitle a tenant in dower to take firewood there must be a house upon the land when her dower is assigned to her; that she can take wood to use in such house only; and that if she takes it herself, or permits another person to take it, to be used in any other place, it is waste: *Fuller v. Wason*, 7 N. H. 341. See, too, *White v. Cutler*, 17 Pick. 248. And it has been held that a widow to whom two distinct estates are set off for dower cannot take firewood from one of them to use upon both: *Cook v. Cook*, 11 Gray, 123. But see *Owens v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467. Generally, however, where a widow has dower assigned her in a tract of land, the reversion of which is divided among several reversioners, she has a discretionary right to cut estovers from what part of the land she pleases. But probably if she acts out of mere caprice and partiality, with a view to favor one at the expense of the others, a court of equity could be induced to interfere: *Dalton v. Dalton*, 42 N. C. (7 Ired. Eq.) 197. See, too, *Padelford v. Padelford*, 7 Pick. 152. Generally speaking, the right to estovers is equal in all parts of the woodland, and extends to the whole tract: *Hinton v. Fox*, 3 Litt. (Ky.) 380.

VII. Persons Who Cut or Use Timber.

The right to estovers is usually invoked in favor of the tenant himself, whether he be a tenant for life or for years, who occupies the premises; and he is not bound to resort for fuel and timber, necessarily and properly used on the premises, to outlying lands owned by him, unconnected with and not belonging to the farm: *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705. Moreover, a life tenant may, in addition to her own fuel, take from the premises a sufficient amount of firewood to supply persons employed by her to work the farm who live in a separate house on the premises, or maintain separate fires, provided the inheritance is not thereby injured: *Smith v. Jewett*, 40 N. H. 530; *Gardiner v. Deering*, 1 Paige, 573. Compare *Sarles v. Sarles*, 3 Sand. Ch. 601.

VIII. Remedies of Parties.

a. *Of the Landlord or Reversioner.*—Where a tenant fells trees under circumstances which constitute waste, an action lies immediately by the reversioner to recover damages to the freehold: *Robinson v. Kime*, 70 N. Y. 147, 151. See, too, *Fuller v. Wason*, 7 N. H. 341; *Clemence v. Steere*, 1 R. I. 72, 53 Am. Dec. 621. "If the tenant," to quote from *Schermerhorn v. Buell*, 4 Denio, 422, 424, "im-

properly cut the timber, his interest in it thereby determined; and the landlord may have an action of waste, and action on the case in the nature of waste, or an action on the contract, where there is one touching the subject, for the injury done the land; or he may have an action of trover for the wood which has been severed from the freehold." "Trees, when felled, or severed from the soil, become personal property in which the tenant has no interest when cut for profit; and the reversioner may maintain his action for the possession of the property, or for damages therefor, in the same manner and with like effect as if he were the owner of the estate in question": *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 South. 278. The reversioner, however, is not confined to legal remedies; he may, in a proper case, have the cutting of timber enjoined: See *Livingston v. Reynolds*, 2 Hill, 157; *Sarles v. Sarles*, 3 Sand. Ch. 601; monographic note to *Moore v. Halliday*, 99 Am. St. Rep. 748-750.

b. **Of the Tenant.**—If the right to estovers is disturbed or impaired by a trespasser, the tenant is entitled to recover for the injuries which he suffers in respect to such right: *Zimmerman v. Shreeve*, 59 Md. 357. The land trespassed upon in this case was an outlying wood lot, used exclusively for its wood and timber, which constituted its chief value. The court decided that the tenant's damages should be restricted to the injury done to his interest in the estate, that is, his right to reasonable estovers, and should not extend to the injury done the estate in remainder.

IOWA PIPE AND TILE COMPANY v. CALLANAN.

[125 Iowa, 358, 101 N. W. 141.]

STREET ASSESSMENTS—When Unequal and Unjust.—A sewer assessment on a lot eight feet deep at the same rate per front foot as is applied to lots fronting the same street and having a depth of from one hundred and twenty to one hundred and seventy-five feet, is so manifestly unequal and unjust that it will be declared invalid as taking property without due process of law. (p. 312.)

STREET ASSESSMENTS—Equitable Relief from—Tender.—If an entire assessment against abutting property for street improvements is invalid, the owner is not required to tender any portion thereof as a condition to equitable relief. (p. 317.)

STREET ASSESSMENTS—Liability of City When Tax Invalid. If a street assessment against an abutting property owner is illegal, but the work is done under a contract with the city authorized by law and by its ordinances, and the city has received the benefits, a stipulation in the contract that the contractor shall receive assessment certificates in full payment for his work without recourse on the city does not relieve the city from liability on account of the invalid assessment. (p. 318.)

STREET ASSESSMENTS — Notice.—Different Improvements may be legally noticed in the same document. (p. 318.)

Dudley & Coffin and A. P. Chamberlain, for the appellants.

W. H. Bremner, for the appellee.

³⁵⁸ SHERWIN, J. Suit in equity to foreclose three assessment certificates issued by the city of Des Moines for the construction of a sewer on Tenth street, and asking a personal judgment against the appellant Callanan and a judgment against the city of Des Moines. The undisputed facts in the case are substantially as follows: The appellant Callanan was the owner of lot 9 in blocks 1, 2 and 3 in an addition to the city of Des Moines. The lots were originally each ³⁵⁹ thirty-three feet wide and one hundred feet long. After his purchase thereof, the city condemned twenty-five feet in width off of the west side of each of the lots for the purpose of opening Tenth street, leaving three strips of ground each eight feet wide, and each abutting said street their full length, one hundred feet. Thereafter a sewer was built on Tenth street, and the lands abutting thereon were assessed to pay for it according to the frontage of the lots. Before the assessment was made, however, Mr. Callanan sold a strip five feet wide off of the east side of one of the lots. Each of these three strips of ground was assessed on the basis of its frontage on the street, each an equal amount, and each the same amount per front foot that was assessed to lots on the same street having a depth east and west of from one hundred and twenty to one hundred and seventy-five feet. The answer of Mr. Callanan alleges that the strips of ground are not and cannot be benefited by the sewer; that they were assessed as though they were full lots, equal in value to other full-sized lots along the street benefited by the sewer; that such assessment is inequitable and unjust, and in violation of the constitution of the United States, in that his property is taken without due process of law. There was a trial, and a personal judgment against Mr. Callanan for the full amount claimed, with interest, and the suit against the city was dismissed. Mr. Callanan and the plaintiff appealed.

The assessment in this case is so manifestly unequal and unjust, and is so clearly governed by the rule announced by the supreme court of the United States in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443, that we are constrained to hold it invalid.

³⁶⁰ This court has uniformly upheld the frontage rule of assessment, regardless of the special benefit to the property, the latest pronouncement on the subject being in *Hackworth v. City of Ottumwa*, 114 Iowa, 467, 87 N. W. 424, and, were it not for

the controlling force of the Norwood-Baker case, we should perhaps feel bound to follow the rule in this case. It should be said, however, that in no case involving this question upon which we have heretofore passed, have the facts been similar to those before us now, and hence we have never before been called upon to determine the precise question involved here. It is true that we have sustained front-foot assessments regardless of benefits and justified the power on the ground of the right of taxation for the public good: *Warren v. Henly*, 31 Iowa, 31, and cases following the rule there announced. But in none of the cases was there such a showing of inequality in the assessment as to make it clearly appear that the assessment could not possibly be just. On the contrary, in none of the cases, as we now recall them, was there a showing of any special inequality, or at least no greater inequality than would inevitably exist under any rule of taxation. In *Amery v. City of Keokuk*, 72 Iowa, 703, 30 N. W. 780, the only question was whether the lot owner was entitled to notice of the assessment of the tax, but in a general discussion of the case it was said "that all that was required was the lineal measurement of the front of the lots abutting on the street There was no authority to institute an inquiry as to how far back from the street the rights of the abutting owner extended." There was, however, no showing of inequality in that case. The lots in question were originally of such size as to be valuable for business or residence purposes, but after the city had taken therefrom twenty-five feet for street purposes, the remaining strips of ground manifestly had no value for purposes of improvement, and could only be used in connection with the lots adjoining them on the east; and, if the adjoining owners did ³⁶¹ not want them, they would be useless, and practically without any market value. It is doubtful whether the legislature in conferring upon municipalities the power to assess lots and parcels of land for such improvements, ever intended it to be exercised arbitrarily and in utter disregard of the principles of equality and justice upon which our laws are supposed to be founded.

But, however this may be, and whatever independent conclusion we might reach in this particular case in view of our former holdings, is of little consequence if it be true that this case is controlled by the Norwood-Baker case. The profession is familiar with the issues and facts in that case, but there may be some question as to the extent to which the opinion of the majority goes. In the second edition of *Elliott on Roads and*

Streets, section 558, it is said, speaking of the Norwood-Baker case: "But the supreme court of the United States has recently held that an assessment in substantial excess of the special benefit is invalid, and that the power of the legislature in such matters is not unlimited. The actual decision in the case does not go so far as it has sometimes been supposed to go. . . . We think it is clearly an authority to the effect that a particular assessment is invalid where it is in substantial excess of the benefits, and there is no right to a hearing on which it can be changed, especially where it is physically impossible that the particular property can be benefited to such an extent." And the author adds: "But it does not necessarily follow that the statute itself is unconstitutional merely because it lays down a general rule for determining the special benefits in the first instance, whether by frontage or by any other proper system." In the Norwood-Baker case it is said: "The plaintiff's suit proceeded on the ground, distinctly stated, that the assessment in question was in violation of the fourteenth amendment, providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection ³⁶² of the laws, as well as the bill of rights of the constitution of Ohio." The land taken for the street in the Norwood-Baker case, as in this case, was taken under the power of eminent domain, but in that case valuable tracts of land were still owned by Mrs. Baker on both sides of the street, while here practically nothing was left to the owner.

Speaking of the power of the legislature in that case, Mr. Justice Harlan said: "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exercising the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as

a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an improvement of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact ³⁶³ equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In *French v. Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879, there is a general review of the adjudications on the subject, and the following quotation from 2 *Dillon on Municipal Corporations*, fourth edition, section 752, is cited with approval, and may be said to express the view of the majority of the court: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if the latter mode, whether the assessment shall be upon all the property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." This rule, it will be seen, fully recognizes the principle that the assessment must be made on the theory of special benefits to the property assessed, whether all property benefited be assessed or not. This is apparent not only from the language used, but from the same author's views expressed in section 761 of the same work, where he says:

“Special benefits to the property assessed—that is, benefits received by it in addition to those received by the community at large—is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. When not restrained by the constitution of the particular state, the legislature has a discretion commensurate with the broad domain of legislative power in making provisions for ascertaining ³⁶⁴ what property is specially benefited, and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the leading case in New York (*People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266) have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority.”

In the French case the majority opinion distinguishes it from the *Norwood-Baker* case as follows: “It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty or property without due process of law. And such, in the opinion of the majority of the judges of this court was the nature and effect of the proceedings in the case of *Norwood v. Baker*. But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri: The work done consisted of paving with asphaltum the roadway of Forest avenue in the said city thirty-six feet in width, from Independence avenue to Twelfth street, a distance of one-half mile. Forest avenue is one of the oldest and best improved residence streets in Kansas City, and all the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire ex-

tent is uniform in character and quality. There is no showing that there is any difference in the value of any of the lots abutting upon the improvement."

³⁶⁵ As we have heretofore said, we are of the opinion that this case is ruled by *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. Rep. 187, 43 L. ed. 443, rather than by *French v. Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. Rep. 625, 45 L. ed. 879, and, following the former case, as we are bound to do, we must hold the assessment in this case invalid.

It is contended, however, that, even if the assessment be invalid, the court can grant no relief, because the owner of the property has made no tender of the amount which he should pay. This contention is also best answered in the *Norwood* case, where it is said: "The present case is not one in which—as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments—it can be plainly or clearly seen from the showing made by the pleadings that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over benefits accruing to the property. She was entitled, without making such tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights." The appellant Callanan claims that the land in question is valueless, and that it was physically impossible for it to be benefited by the sewer. It may be that he is in error on both of these questions, but, under the circumstances, we do not think he was bound to tender any sum before asking relief from the unjust imposition on his property. The judgment against him was wrong, and it is reversed.

The city issued to the plaintiff certificates for the amount assessed against the strips of ground, and the plaintiff contends that if the assessment was illegal as to the land and its owner, the city is liable for the value of the work. There is no question as to the ³⁶⁶ facts in the case. The work was properly done under a contract with the city, which was authorized by law and by its ordinances, and the city has received all the benefits of the work. The contract between the plaintiff and the city contained these provisions:

"Said cost is to be assessed as provided by the ordinances of said city, against the private property fronting or abutting on the street or streets upon which said improvement is made, and said assessment shall be payable within the time and in the manner as provided by an ordinance of the city relating to making contracts for paving and curbing streets and alleys, and the construction of sewers and providing for the manner of making and collecting assessments and issuing certificates for the payment thereof, passed February 22, 1889. And it is further agreed that the said assessment certificates shall be received by said Lennan & O'Brien in full payment and compensation for all work done by them under this contract and without recourse to the city of Des Moines."

And while we do not understand from the appellee's argument that it seriously denies the liability of the city in case the assessment is held invalid, there is a suggestion therein that the stipulation that the assessment certificates shall be received in full payment for all work done without recourse on the city relieves the city from all liability on account of its invalid assessment. This position is not tenable, however. The ordinance under which the work was done provided that the cost thereof might be taxed against the private property abutting on the street, and for making and collecting assessments, and for issuing certificates in payment therefor. The contract provided that the cost was to be assessed and paid as provided in the ordinance, but it was not contemplated by either party thereto that the city would make an assessment against abutting property which could not be enforced, and we think it must be held that the latter clause of the contract means nothing more than the acceptance of certificates which are legal, and representing an assessment valid and enforceable. Such was the holding, in ³⁶⁷ substance, in *Ft. Dodge etc. Co. v. City of Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7, where the question was quite fully considered, and we think that case controlling here, and that the city is liable for the amount of the certificates. See, also, *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *Scofield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20.

The amendment to the abstract shows that the notice of the assessment in question related solely to a sewer, and we know of no reason why other and different improvements may not be legally noticed in the same document.

The case is reversed on both appeals.

An Assessment for Street Improvement, based upon the value of lots fronting thereon, without regard to the frontage or depth of the lots, which necessarily causes some of them to pay a much greater sum per front foot than others, is unconstitutional: *Howell v. Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83. See, too, *Hutchison v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884; *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484; *Job v. Alton*, 189 Ill. 256, 82 Am. St. Rep. 448.

LOUGHREN v. BONNIWELL.

[125 Iowa, 518, 101 N. W. 287.]

A STENCIL SIGNATURE of a Justice of the Peace to an original notice, which is not a writ or process issuing out of court, is sufficient to confer jurisdiction, under a statute providing that such a notice "must be subscribed by the plaintiff, his attorney, or the justice of the peace before whom it is returnable." (p. 321.)

SIGNATURE by Justice to Blank Notice.—An original notice, which is not a writ or process issuing out of court, signed by a justice of the peace in blank and delivered to the plaintiff or his attorney with authority to fill it out, will, when filled out and served, confer jurisdiction, under a statute providing that such a notice "must be subscribed by the plaintiff, his attorney, or the justice of the peace before whom it is returnable." (p. 321.)

Suit to enjoin a judgment rendered in favor of B. F. Bonniwell & Co. against plaintiff herein by a justice of the peace. A temporary injunction was granted which afterward was dissolved, and plaintiff's petition was dismissed. Plaintiff appealed.

H. W. Holman and Charles Mackenzie, for the appellant.

No appearance for the appellee.

519 **DEEMER, C. J.** The action before the justice of the peace was upon a written contract, which, by its terms, was to be performed in Des Moines, Polk county, Iowa. An original notice, regular on its face, save that it was signed in the name of the justice with a stencil stamp, and dated November 1, 1902, was duly served upon the plaintiff herein in Buchanan county, Iowa—that being the place of his residence—returnable November 17, 1902. Plaintiff did not appear in response to this notice, and judgment was rendered against him by default. This suit is not a direct, but a collateral attack upon that judgment; and the ground of the action is that the justice had no jurisdiction over plaintiff herein, for the reason that he did not sign the

original notice with his own hand, and did not fill out the said notice before delivering it to the party who served it, but simply gave him a blank notice signed with a stencil stamp bearing a facsimile of the justice's signature, which was afterward filled in and served upon the plaintiff. Fraud in obtaining the contract upon which the action before the justice was bottomed and in obtaining judgment is also pleaded, but neither of these matters is material to our inquiry in this case. If the justice had jurisdiction, plaintiff is precluded, by the judgment, from now pleading fraud in the procuring of the contract upon which the justice's judgment was bottomed. And there is no evidence of any fraud in obtaining the judgment before the justice.

The sole inquiry is, Had the justice jurisdiction of the case brought before him? It is contended that the stencil signature of the justice to the original notice was no signature, and that the notice when it left the justice's hands was a mere blank piece of paper, which could not be validated by the act of a third person in filling out the notice. Section 4488 of the code provides that an original notice in justice's court "must be subscribed by the plaintiff, his attorney, or the justice of the peace before whom it is returnable." It is ⁵²⁰ contended that the word "subscribe" means to write under or to set one's hand to a writing, and that the signing by a facsimile stencil stamp will not suffice. The better definition, we think, as applied to the word used, as in the statute in question, is to set under or to write under, as opposed to a signature at some other place. It refers rather to the place of signature than to the manner thereof; that is to say, the signature must be at the end of the instrument, rather than at some other place. Of course, the instrument must be signed by a person authorized by statute, but this signature need not be made with pen and ink, or even with a pencil. A mark or signature made by another with authority, or even a printed signature, intended as such, has generally been held sufficient: *Zacharie v. Franklin*, 12 Pet. 161, 9 L. ed. 1035; *Shank v. Butsch*, 28 Ind. 19; *Compton v. Mitton*, 12 N. J. L. 70; *Vines v. Clingfost*, 21 Ark. 312; *Hamilton v. State*, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299; *Hawkins v. Chase*, 19 Pick. 504; *Brown v. Butchers' etc. Bank*, 6 Hill (N. Y.). 443, 41 Am. Dec. 755; *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849. Facsimile stamps such as were used in this case are quite common in these days of haste and hurry, and courts have generally regarded such a signature as sufficient, and the equivalent of a signing with pen and ink

or pencil: *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849; *Streff v. Colteaux*, 64 Ill. App. 180; *Mezchen v. More*, 54 Wis. 214, 11 N. W. 534; *Scott v. Seaver*, 52 Wis. 175, 8 N. W. 811. The statute does not require that the notice be subscribed by the parties named in their own proper handwriting, and it is generally held that such papers as an original notice are sufficient, even if the signature be a printed one: In *re Walker*, 110 Cal. 393, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460. There is no reason why an original notice, which in this state is not a writ or process issuing out of court, should be signed by the person authorized, in his own proper handwriting. ⁵²¹ The instrument is nothing but a notice, which may be signed not only by a justice, but by the party or his attorney, without the knowledge or consent of the justice, and in either event it is sufficient, if properly subscribed. This subscription may therefore be by a facsimile stencil, if the signature, when affixed at its proper place, is authorized, or is intended to take the place of handwriting in the usual manner: *Ligare v. California R. R. Co.*, 76 Cal. 610, 18 Pac. 777; *Hancock v. Bowman*, 49 Cal. 413; *Pennington v. Baehr*, 48 Cal. 565. Even if the signature were held irregular, it does not follow that the judgment is void and subject to collateral attack. The notice would, at most, be merely voidable, and advantage of the defect could only be taken by direct proceedings: *Arts v. Rocksien*, 98 Iowa, 536, 67 N. W. 409; *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849; *Hendrick v. Whittemore*, 105 Mass. 23. The cases cited are quite satisfactory in their reasoning, and we need not say more on this point.

2. The next proposition, although not so much relied upon by counsel as the first, is the more doubtful one. The testimony tends to show that the justice signed the notice in blank, and delivered it to Bonniwell & Co., or its agent, who filled out the notice, and delivered it to another for service on plaintiff. After being filled out, it was duly served. It also appears that the party who filled out the notice had authority from the justice to do so. If this notice were a summons, a writ, or a precept issued by the justice, we should be inclined to hold it insufficient to give the justice jurisdiction. But it is not. It might as well have been signed by the plaintiff in the action, or by his attorney as by the justice. The justice had no duty to perform with reference thereto, save to subscribe his name thereunder. He gave the plaintiff, or his agent or attorney authority to fill out the notice after he had signed it; and we think this was

sufficient in law, and, when properly served, operated to confer jurisdiction. ⁵²² There is no reason why the justice could not delegate to another the power of filling out the notice. Surely he might do this before signing it, and, if this be true, we know of no reason why he could not authorize it to be done afterward. Indeed, we are not sure but that he might subsequently ratify the act of filling it out, even had there been no previous express authority to do so. The only object of the notice is that the defendant in the action may know when and where to appear to answer the complaint or petition. Signature thereto is required by statute to indicate that some one is responsible for it. The defendant in that action and the plaintiff in this had notice of every fact to which he was entitled, and the mere fact that the justice signed the notice in blank, and not after it was filled out, did not deprive him of jurisdiction. At most, it was a mere irregularity, which cannot be taken advantage of by this form of action. If the notice were a writ or other process issuing out of court, we should be disposed to reach a different conclusion. But it was not, and, as plaintiff herein was in no manner prejudiced on account of the alleged irregularity, we think the trial court was right in dissolving the temporary writ of injunction and in dismissing plaintiff's petition. We are not to be understood as holding that every paper in a judicial proceeding may be treated as this one was, or that authentication certificates or other legal documents may be signed in blank and afterward affixed to the original or to copies thereof. The proposition here decided must be limited to such notices as are involved in the instant case. *Arts v. Rocksein*, 98 Iowa, 536, 67 N. W. 409, is really decisive of every point in the case. *Hoitt v. Skinner*, 99 Iowa, 360, 68 N. W. 788, relied upon by appellant, is not in point. There the copy of the notice delivered to the defendant in the action did not purport to be signed by anyone, and it was presumed that the original was in the same condition.

The order and judgment of the trial court are affirmed.

The Signature to a summons in a civil action need not be in the handwriting of the plaintiff or his attorney; any signature, whether written, printed, or lithographed, which the party issuing the summons may adopt as his own, will be sufficient: *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841. And an indictment is sufficiently "signed" by the prosecuting attorney, when his name with his official title is printed at the bottom with his sanction: *Hamilton v. State*, 103 Ind. 96, 53 Am. Rep. 491.

ROMANO v. CAPITAL CITY BRICK AND PIPE CO.

[125 Iowa, 591, 101 N. W. 437.]

ALIENS—Right to Sue.—As to Rights arising or recognized within the jurisdiction of our courts, a nonresident alien may sue therein without any special statutory authority. (p. 324.)

DEATH.—A Statute Giving a Remedy for an Injury causing death is not penal in its nature, and therefore is not limited, as to the remedy it affords, to the state of its enactment. (p. 329.)

DEATH—Nonresident Aliens.—An Administrator appointed in Iowa may maintain an action in that state for an injury resulting in death to a resident alien, though it affirmatively appears that the intestate's sole heir is a nonresident alien. (p. 331.)

Miller, Wallingford & De Graff, for the appellants.

Ryan, Ryan & Ryan, for the appellee.

⁵⁹¹ McLAIN, J. Action to recover damages for the death of intestate, Natale Chiesa, occasioned by the negligence of defendant, in whose employment he was working at the time of receiving the injury which caused his death. The defense interposed was that Natale Chiesa was unmarried and without issue, and that his next of kin was his mother, who is an alien residing in Italy, and that he left no estate to be administered upon, wherefore the letters of administration issued to the plaintiff were without authority. By way of reply, plaintiff alleged that intestate left as his only heir his mother, a citizen and resident of Italy, and that the mother is entitled to the proceeds of the estate by reason of the provision of articles 22 and 23 of the treaty of commerce and navigation between Italy and the United States (17 Stats. 856), concluded in 1871, which treaty continues in full force and effect between the respective countries. To this reply a demurrer was interposed on the ground that it shows upon its face that the suit is brought by an administrator to recover for an injury to the person of intestate resulting ⁵⁹² in death, and that such action does not survive to his mother, who, as his sole heir, does not reside here, and is now an alien, and that this action cannot be maintained by an administrator for her, and further, that the treaty pleaded does not include or provide for the survival of an action of this character for the benefit of a nonresident alien. The demurrer was sustained, and plaintiff electing to stand upon his pleadings, the court dismissed the case and entered judgment against the plaintiff for costs, from which judgment plaintiff appeals.

It is conceded by counsel on each side that the question presented on this appeal is whether an administrator appointed in Iowa may maintain an action in this state for an injury resulting in death to a resident alien, when it affirmatively appears that intestate's sole heir was at the time of said death, and still is, a nonresident alien.

Counsel for appellee contend that the statutory provision (Code, sec. 3443) that "all causes of action shall survive and may be brought, notwithstanding the death of the person entitled or liable to the same," should not be given extraterritorial effect, and should be so construed as not to confer a benefit upon nonresident aliens. It seems to us, however, that they misapprehend the scope of the generally recognized doctrine that statutes have effect only within the jurisdiction of the sovereign power by which they are enacted. It is not claimed that this statute is to have any force and effect in Italy. The accident happened in Iowa; the person injured, as well as the defendant, is a resident of Iowa; and the wrong done by defendant, if any, was done in Iowa. It is difficult, therefore, to see how it can be urged that any question of extraterritoriality arises. The contention for appellee seems rather to be that a nonresident alien is not to be regarded as a person entitled to the benefits of the Iowa statute, although he comes within the plain terms of its provisions. The argument recalls the theory of the old Roman law that laws are personal rather than territorial in their application, for, under the doctrine of the Roman civil law, a Roman citizen only could assert the rights and avail himself of the remedies recognized by that system, and aliens, even though they might be residents, must resort to a wholly distinct jurisdiction to secure redress for wrongs which they may have suffered: Muirhead's Roman Law, sec. 25. It is unnecessary to say that the theory of the common law in this respect is wholly different. Under the common-law theory, laws are territorial in their operation; and, while a sovereign may legislate with reference to its subjects outside of its territorial jurisdiction, general legislation is assumed to apply to all persons residing, all property situated, and all rights arising within its territorial jurisdiction, regardless of the status of the parties, as being citizens or aliens. As to the rights arising or recognized within the jurisdiction, a nonresident alien may maintain suit in the courts without any special statutory authority: *Knight v. West Jersey etc. R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Vet-*

aloro v. Perkins (C. C.), 101 Fed. 393. It would certainly strike the profession in this state as most extraordinary and unprecedented if we should hold that a nonresident alien could not, in the absence of express statutory authority, avail himself of a statutory remedy in our courts, such as that of an attachment or a garnishment proceeding.

A few cases are cited in support of the general proposition that statutes are to be construed as applicable only in favor of persons within the jurisdiction: See, for example, *Jeffreys v. Boosey*, 4 H. L. Cas. 815; *Colquhoun v. Heddon*, 25 Q. B. Div. 129; *Collom's Appeal*, 2 Penny. (Pa.) 594 130. But without going into a discussion of these and similar cases for the purpose of showing that they cannot be regarded as supporting the broad proposition that general statutory rights and remedies are not available to nonresident aliens, it is sufficient to say that no such general rule of construction has been adopted in jurisdictions where the common law prevails, nor, indeed, in those in which the civil law is recognized, for even in civil law jurisdictions the principle of territoriality as opposed to that of personality of laws is now accepted.

Nevertheless, the misconception arising from the assumption of a general rule that statutes conferring benefits are to be construed as not extending to nonresident aliens has in some jurisdictions been applied in solving the identical questions which we now have before us; that is, the question whether a statute giving a remedy for an injury causing death is available for the benefit of nonresident aliens. Thus, in *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558, it is said that "while it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it." And the reasoning of that case is followed in *Brannigan v. Union Gold Min. Co.* (C. C.), 93 Fed. 164, by Hallett, district judge, charging the jury in a similar case arising under the laws of Colorado. Likewise, in a recent case in Wisconsin, *McMillan v. Spider Lake Sawmill Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589, the doctrine that the laws of one country can have no extrinsic force except within the territorial limits and jurisdiction of that country, is invoked to support the conclusion that the statute giving a remedy to the relatives of one who is instantly killed is not available to nonresident

aliens. In *Adam v. British & Foreign S. S. Co.*, [1898] 2 Q. B. Div. 430, the same conclusion ⁵⁹⁵ is reached under the English fatal accidents acts, the first of which was Lord Campbell's act (9 & 10 Vict., c. 93); and it was held, apparently by one judge, that a nonresident alien relative could not avail himself of the statutory remedy. In his opinion, however, the judge does not refer to two earlier decisions of the English courts in which a contrary conclusion was reached. See *The Guldfaxe*, L. R. 2 Ad. & E. 325, and *The Explorer*, L. R. 3 Ad. & E. 289, in which Sir Robert Phillimore expressed, though with some doubt, the conclusion that a suit by a nonresident alien under Lord Campbell's act could be maintained in the British admiralty court. It is suggested elsewhere that the two cases just referred to were overruled by the house of lords in *Seward v. The Owner of the Vera Cruz*, L. R. 10 App. C. 59. But that is not in accordance with the fact. The only point decided by the house of lords pertinent to the question was that the court of admiralty, under a statute giving it jurisdiction over any claim for damages done by any ship, did not have jurisdiction in rem over claims for damages for loss of life under Lord Campbell's act; and nothing said in that case is conclusive on the right of a nonresident alien to maintain such an action in the common-law courts of England.

In the American cases in which it has been held that a nonresident alien could not maintain an action to recover the relief provided for by statutes similar to Lord Campbell's act, the lack of any English precedent for such recovery is commented upon; but such precedent is no longer wanting, even if the cases just cited are disregarded, for in *Davidson v. Hill*, [1901] 2 K. B. Div. 606, the question has been fully considered in opinions rendered by Sir William Rann Kennedy and Sir Walter Phillimore, and the conclusion is unequivocally announced that the fatal accidents acts apply as well for the benefit of representatives of a deceased foreigner as for those of a British subject—at all events, as against an English wrongdoer; and the principle ⁵⁹⁶ contended for in that case by the defendant, that acts of parliament do not apply to nonresident aliens, unless the language of the statute expressly refers to them, is repudiated in such a case, and the *Adam* case is overruled. Kennedy, J., uses this language: "It appears to me, under all the circumstances, and looking at the subject matter, more reasonable to hold that parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that against English wrongdoers the foreigner has a right

to maintain his action under the statutes in question." As the action was against the English owner of a British ship, he does not expressly hold that the same rule would be applicable if the death occurred through negligence in a collision upon the high seas where both parties were foreigners, or where the wrongdoers were foreigners and the sufferers English, though even as to that question he expresses the opinion that such an action could be maintained. Phillimore, J., says: "If an Englishman on board a foreign ship, or a foreigner on board a British ship, is run down by a British ship upon the high seas, it seems almost certain that an action would lie. Are the representatives of the foreigner on board a ship of one nationality, whose national law would probably give them at least as good a remedy as that given by the fatal accidents acts, to be deprived of their right to recover because they must have recourse to statute law instead of to the unwritten common law? I think not." And his reasoning with reference to the exact question is expressed in the following language: "I start with the proposition that if a man had not been killed, but only injured, he, during his life, could have maintained an action for damages; such an action being maintainable by the *lex fori* and by the *lex loci delicti commissi*, whether the locus be regarded as English or British, or as the high seas, over which maritime law, or maritime law as administered in this country, prevails." This case we regard as of great importance, because of the emphasis ⁵⁹⁷ placed in some of the American cases upon the construction of Lord Campbell's act in the English courts, and because it is more recent than any of the decisions of those courts in which the contrary conclusion is reached.

But the decided weight of authority in this country is against the proposition that nonresident alien relatives of a deceased person are not entitled to recover under statutes similar to Lord Campbell's act. A leading case is that of *Mullhall v. Fallon*, 176 Mass. 266, 79 Am. St. Rep. 309, and note, 57 N. E. 386, 54 L. R. A. 934, in which Chief Justice Holmes, after referring to *Adam v. British & Foreign S. S. Co.*, [1898] 2 Q. B. Div. 430, *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525, 59 Am. St. Rep. 676, 37 Atl. 558, and *Brannigan v. Union Gold Min. Co.*, 93 Fed. 164, as cases supporting the contrary conclusion, announces the view of the Massachusetts court to be that the statute of that state is in the interest of the employé, and that, whether the action is to be brought by the relative or by the administrator, as the sum to be recovered is to be assessed as to the degree of culpability of the

employer or negligent person, nonresident aliens are not intended to be excluded from the relief which the statute affords. He cites in support of his conclusion the following cases, which we have examined, and find to be more or less in point: *Luke v. Calhoun Co.*, 52 Ala. 115; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Philpott v. Missouri Pac. Ry. Co.*, 85 Mo. 164; *Bruce's Admr. v. Cincinnati Ry. Co.*, 83 Ky. 174. It is true that these cases relate to right of recovery by a relative who is a citizen and resident of another state, and counsel in the case before us have urged that the rule as to nonresident aliens may well be different; but, if their contention is correct, that to give force to the statute in favor of a nonresident alien is to give it extraterritorial effect, then these decisions are in point, for a state statute has no more effect or operation in another state of the Union than in a foreign country; and it is no answer to say that, by a provision of the federal constitution, citizens of the other ⁵⁹⁸ states of the Union are not to be denied the privileges and immunities accorded to citizens of the state, for, if the statute is to be applied only for the benefit of those who are subject to state law, then residents of another state are excluded, as not among the persons for whose benefit the statute was passed.

The same conclusion as to the right of a nonresident alien to recover under the Massachusetts statute was reached in *Vetaloro v. Perkins* (C. C.), 101 Fed. 393, decided in the federal circuit court by Colt, circuit judge, before the Massachusetts court had passed on the question. The Massachusetts case has been followed in later decisions in other states: *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 93 N. W. 1057; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Bonthron v. Phoenix Light etc. Co.* (Ariz.), 71 Pac. 941, 61 L. R. A. 563. In the last case cited, after discussing the authorities pro and con, the court uses this pertinent language: "We do not think that, in order to entitle an alien to maintain this action, specific authority therefor must be granted said alien by the legislature. The act is broad and comprehensive, and by its terms includes any surviving wife, husband, child, or parent, irrespective of their residence or citizenship; and this includes aliens, in the absence of any restrictive legislation. . . . The object of the act is to extend beyond the limits of the common law the right to recover reparation for a wrong, and we fail to see why, the wrong having been committed, the same reparation should not be given, whether those entitled to it

are citizens of a state of our Union, or citizens of that country whose law we have inherited, and whose legislation in this instance we have adopted. An alien can maintain in our courts an action to enforce rights cognizable at common law, and a statute authorizing a right of action, if declaratory merely of the common law, in the absence of specific restriction, would not exclude aliens, or prevent them ⁵⁹⁹ from availing themselves of its benefits. There is no difference in principle between such a case and a statute which grants rights not cognizable at common law, or extends rights beyond the limits affected by the common law. In the absence of a specific restriction, the legislature is presumed, by its enactment enlarging rights common to all, to have intended that such enlargement of rights be common to all."

That a statute giving a remedy for an injury causing death is not to be regarded as penal in its nature, and therefore limited, as to the remedy to be afforded under it, to the state of its enactment, is now well settled: *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. ed. 439; *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537; *Boyce v. Wabash R. R. Co.*, 63 Iowa, 76, 50 Am. Rep. 730. And see *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. Rep. 224, 36 L. ed. 1123.

The English statute and most of the state statutes construed in the cases heretofore referred to give an independent right of action to the relatives of the deceased person—that is they create a new right of action—and, even if we were of the opinion that the weight of reasoning is with those courts which hold that such new right of action is not maintainable by a nonresident alien relative, we should still find it necessary to consider whether, under our own statutes, the line of reasoning shall be followed. By Code, section 3443, already quoted, the cause of action survives and may be brought notwithstanding the death of the person entitled to maintain the same; and under this provision it has uniformly been held in this state that the right of action is in the administrator for the benefit of the estate of the deceased person and not in the relative suing in his or her own right. "In other words, the cause of action no longer dies with the party injured, as at common law, but passes to the administrator as assets of the estate. It does not spring into existence from death, but, having a previous existence, does not perish with him who was entitled to maintain an action thereon": *Sachs v. Sioux City*, 109 Iowa, 224, 80 N. W. 336. "Nothing ⁶⁰⁰ in these statutes indicates a purpose to create a

cause of action in favor of wife or child, save as they may share in the distribution of damages recovered, freed from any claim of creditors": *Major v. Burlington etc. Ry. Co.*, 115 Iowa, 309, 88 N. W. 815; and see *Seney v. Chicago etc. Ry. Co.*, 125 Iowa, 290, 101 N. W. 76. By Code, section 3313, it is provided: "When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased; but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts." It is apparent, therefore, that our statutory provisions differ materially from those passed in analogy to Lord Campbell's act, for they do not create a new right of action, but abrogate the common-law rule by which an existing cause of action is terminated on the death of the party entitled to recover. That Natale Chiesa, had he survived the injuries received, could have maintained an action for damages against the defendant, must be conceded, for present purposes, in view of the allegations of the pleadings. That this cause of action survived his death, and could be made the basis of recovery by his personal representative, is expressly stated by the statutory provisions; and it is also expressly stated that the damages recovered in such an action are to be disposed of as a part of his estate. Now, we cannot see how, for the purposes of this action, it is necessary to determine who are his heirs, and as such heirs, will be entitled to distributive shares in his estate, whatever it may be.

It is contended for defendant that he left no estate to distribute, and therefore an administrator was improperly appointed; but that contention has been expressly negatived in *Morris v. Chicago etc. Ry. Co.*, 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143. The statute does not say, as do the statutes in many other states, that the recovery shall be for the benefit of certain named relatives, but expressly says that it is to be for the benefit ^{of} of the estate. It will be soon enough to be concerned about whether decedent's mother, a nonresident alien, is entitled to the proceeds of the recovery, when the administrator is called upon to make distribution of the estate of the deceased. On this last point, however, our attention is called to the case of *Cleveland etc. R. Co. v. Osgood* (Ind. App.), 70 N. E. 839, in which the appellate court of Indiana construing statutory provisions similar to ours, holds that no right of action arises thereunder in behalf of the administrator where the next of kin who would be entitled to recover are nonresident aliens. We are not

satisfied with the conclusions reached in that case, either with reference to the weight of authority of the cases relating to statutes similar to Lord Campbell's act, or with reference to the proper construction to be given to the statutory provisions such as those found in Indiana and in our own state. In *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053, the appellate division of the supreme court of New York had before it the identical question which we are now considering, arising under a statutory provision of that state as follows: "The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued"; and the conclusion was reached that such action could be maintained, although the next of kin of the deceased were nonresident aliens. The court uses this language: "The negligent killing was within our own territory, and by a citizen corporation of our state, liable under its laws. The deceased was a resident, although an alien, and entitled to the protection and benefit of both our common law and statutes. There can be no question that, if he had not died, he would have had a right of action against the defendant; and we think his representative ⁶⁰² can maintain the action prescribed by the statute, notwithstanding the ultimate fruits of the litigation shall pass to a nonresident alien next of kin. . . . To deny the action because the widow and next of kin are nonresident aliens is to incorporate into the sections of the code a restriction which they do not contain. It is to refuse compensation to a certain class of persons for a real injury recognized by the statute. We see no reason, either from the probable intent of the legislature, or from the holdings of our courts with respect to the act, why the exception contended for should be held to exist. The words are broad, and comprehend every widow and all next of kin, whether citizens, residents, aliens, or nonresident aliens. The only qualification is that the representative shall present such a cause of action as would allow the intestate to recover, had he not died."

In view of the conclusions already indicated, it is not necessary to follow counsel in a discussion of the question whether the right of action by the administrator, by which the mother of Natale Chiesa, a resident of Italy, is to receive ultimate benefit, is protected by the provision of the treaty between Italy and the

United States.that "the citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, . . . and their representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or ab intestato," etc. As already indicated we think no question of that kind is at present before us. We have now only to decide whether the plaintiff, duly appointed as administrator, may maintain this action.

We reach the conclusion that the decision of the trial court is erroneous, and its judgment is therefore reversed.

That an Action for Wrongful Death may be maintained for the benefit of a nonresident alien, see *Renland v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534, and consult the cases cited in the cross-reference note thereto.

MALANAPHY v. FULLER & JOHNSON MANUFACTURING COMPANY.

[125 Iowa, 719, 101 N. W. 640.]

CONTRACTS—Promise to Assume Debt of Another.—Where one for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of the promise, and he may single out the promisor and sue him by direct action, subject to all inherent equities arising out of the contract affecting the principal parties, one with the other. (p. 335.)

SURETYSHIP—Promise to Pay Debt of Another.—Where one for a sufficient consideration agrees to pay the debt of another, the promisor becomes the principal obligor and the promisee the surety; and if the creditor accepts the promise, he becomes bound to observe the relation of principal and surety existing between such parties. (p. 335.)

SURETYSHIP—Release of Surety.—If a Purchaser of a business assumes and agrees to pay a debt of the vendor evidenced by a note, and the creditor declines to accept the purchaser's note, but does accept a note executed by both the purchaser and the vendor, without surrendering the original note, a discharge of the purchaser from liability releases the original debtor also. (p. 336.)

* Dan. Shea, for the appellant.

W. L. Converse, for the appellees.

720 BISHOP, J. Action in equity to restrain the enforcement of a judgment at law under execution. The action was commenced by M. J. Malanaphy and James Daly, formerly partners

under the firm name of Malanaphy & Daly, and as such doing business at Decorah, this state, as dealers in farm implements. Before the trial the said Malanaphy died intestate, and Mary A. Malanaphy, administratrix of his estate, was substituted as plaintiff. The material facts are not seriously in dispute. On June 20, 1889, the firm of Malanaphy & Daly was indebted on merchandise account to the defendant company in the sum of one hundred and seventy-nine dollars, and on that day the firm note was given for said sum, due November 1, 1890, with interest after maturity. Shortly thereafter Malanaphy & Daly sold and transferred its business, including stock on hand, to the partnership firm of Christen & Gilbertson. As part of the consideration for the sale Christen & Gilbertson assumed and agreed to pay the indebtedness to defendant represented by the note given as above stated. Malanaphy & Daly wrote to the defendant company, giving advice of the sale, and requesting the acceptance of a note of Christen & Gilbertson in place of their obligation. This ⁷²¹ the defendant by letter declined to do. It appears, however, that a note payable to the defendant company was executed for the sum named, due November 1, 1890, with interest after maturity, signed "Christen & Gilbertson," and below, "Malanaphy & Daly," and this note was sent to the defendant company. The record is silent as to any correspondence, if such there was, subsequently had, making further reference to the subject. It sufficiently appears, however, that the defendant company was advised as to the assumption of the debt by Christen & Gilbertson, and the secretary thereof testified as a witness upon the trial that, while the company refused to accept of the later note and release Malanaphy & Daly on the former one, it did accept and hold such later note as collateral security. The firm of Christen & Gilbertson thereafter obtained goods of the defendant company on credit, and later on a judgment was recovered against said firm on such account. In February, 1892, the defendant company brought suit in the district court of Winnebago county on the said note of Christen & Gilbertson and Malanaphy & Daly, and obtained judgment by default against Clarence Christen, one of the members of the firm of Christen & Gilbertson, and M. J. Malanaphy and James Daly, for the face amount of such note and interest accrued. In February, 1895, the defendant company accepted from said Clarence Christen the sum of two hundred dollars, of which sum it applied forty-one dollars and sixty cents on said note judgment, and the balance on the judgment held by it against Christen & Gilbertson. In

consideration of such payment, defendant executed and delivered to said Christen a writing whereby, as to the note judgment in question, it did "release the said Clarence Christen from any and all liability under and by virtue of said judgment, and hereby discharge said judgment of record as to said Clarence Christen, but as to the other defendants the judgment shall be and remain in full force and effect." It appears that this was done without the knowledge or consent of Malanaphy & Daly. Defendant being about to enforce collection ⁷²² of the balance of such note judgment by execution, this action was brought for an injunction to restrain the same, and further praying that said judgment be held as of no further effect, and for cancellation thereof. Trial being had, there was a decree in favor of plaintiffs, and defendants appeal.

The contention of plaintiffs in the court below was that the release of Christen from all further liability upon the judgment now sought to be enforced operated ipso facto to release both Malanaphy and Daly, and such is the argument in this court. A correct understanding of the relations of the several parties, each to the other, will serve to make clear the proper determination of the question thus presented. The defendant company having refused to accept of a note signed by Christen & Gilbertson in payment of the note held by it against Malanaphy & Daly, the latter, as a matter of course, continued to be bound upon its obligation according to the terms thereof. Now, as already stated, when Malanaphy & Daly sold and transferred its property to Christen & Gilbertson, the latter, in consideration thereof, and as part payment of the purchase price, assumed and agreed to pay the debt owing by Malanaphy & Daly to the defendant company. The rights of the parties arising out of this situation may be stated thus: As between Christen & Gilbertson and the defendant company, the implied relation of debtor and creditor arose eo instanti by operation of law. It is well-settled doctrine that, where one for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of the promise, and he may single out the promisor and sue him by direct action: *Johnson v. Knapp*, 36 Iowa, 616; *Poole v. Hintrager*, 60 ⁷²³ Iowa, 180, 14 N. W. 223; *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. 429. Necessarily the rights of a party for whose benefit a promise is made must be measured by the terms of the agreement between the principal parties, and the right to recover from the promisor is not absolute in all cases. Among other limitations,

the party to be benefited takes subject to all inherent equities arising out of the contract, as affecting the principal parties one with the other. This follows naturally from the relation of privity which the law implies: *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Brandon v. Hughes*, 22 La. Ann. 360; *Trimble v. Strother*, 25 Ohio St. 378; 7 Am. & Eng. Ency. of Law, 2d ed., 109.

Turning our attention to the principal parties to the contract, it is quite clear that as between them the promisor became primarily liable for the debt. It assumed the relation of a principal, and, as to it, the obligation of the promisee became that of a surety only. As supporting this conclusion, see *Corbett v. Waterman*, 11 Iowa, 86; *Robertson v. Stuhlmiller*, 93 Iowa, 326, 61 N. W. 986; *Jefferson v. Asch*, 25 L. R. A. 257, note; 27 Am. & Eng. Ency. of Law, 2d ed., 433. Now, as a creditor for whose benefit a promise is made takes subject to the equities existing between the principal parties, it follows conclusively that, if he accepts of such promise, he becomes bound to observe the relationship of principal and surety existing between the principal parties, and must act in recognition thereof. As we think, the status of the parties to this action was fixed, as of the time of the promise, by the rules of law thus referred to. We may proceed, therefore, to inquire what change, if any, resulted from the subsequent execution and delivery of the note signed by both the firms named. As we have stated, the giving and retention of such note seems to have been without agreement in terms relating thereto. The statement made by the secretary of the defendant company that it was held as collateral ⁷²⁴ security was evidently a mere conclusion on his part as to the effect of the situation. However this may be, it is clear that such was not the effect implied by law. As the later note was for the same amount, due at the same time, and upon the same terms, as the original note of Malanaphy & Daly, and as Malanaphy & Daly were already liable for the debt represented on a direct promise, and the firm of Christen & Gilbertson liable in the same measure upon a promise implied by law, it must be evident that the only change in the situation was the substitution, through the medium of the note, of a direct promise on the part of Christen & Gilbertson in lieu of the implied promise theretofore existing. The defendant company received nothing collateral in character. It simply held the note as written evidence that both firms were obligated for the payment of the debt. It is to be said, however, that the receipt and acceptance of the note had the effect to

further apprise the defendant company of the relation existing between the two firms, and of its obligation to respect the same.

Accepting of the situation as we find it, our conclusion is that the release of Christen operated to release his principals, Malanaphy and Daly, who, as to him, and with knowledge on the part of the defendant company, were secondarily bound only for the payment of the judgment. The conclusion thus reached has support further in the following cases: Ames v. Maclay, 14 Iowa, 281; Chambers v. Cochran, 18 Iowa, 159; Taylor v. Short's Admr., 27 Iowa, 361, 1 Am. Rep. 280; Roberts v. Richardson, 39 Iowa, 290.

It follows that the decree of the trial court was right, and it is affirmed.

If a Vendee Assumes and Agrees to pay a mortgage existing on the property sold, he becomes the principal debtor in relation to the mortgage debt and the grantor becomes his surety: See Regan v. Williams, 185 Mo. 620, 105 Am. St. Rep. 600; Pratt v. Conway, 148 Mo. 291, 71 Am. St. Rep. 602, and authorities cited in the cross-reference note thereto.

Contracts for the Benefit of Third Persons and their right to sue thereon are discussed in the monographic note to Baxter v. Camp, 71 Am. St. Rep. 176-207. At page 201 of this note it is stated that if the promise is void as between the promisor and the promisee, the third party cannot sue.

RIPPE v. BADGER.

[125 Iowa, 725, 101 N. W. 642.]

COTENANTS—Who are—Purchaser at Judicial Sale.—Where the undivided interest of one cotenant is sold under execution, the purchaser becomes a cotenant with the other tenant in common. (p. 337.)

COTENANTS—Contribution.—If One Cotenant Pays Off a lien on the common property, or pays more than his share thereof, or if he pays more than his share of the purchase price, he is entitled to contribution from his cotenants for their proportion, and has a lien on the property to secure the payment thereof. (p. 337.)

COTENANTS—Contribution Against Execution Purchaser.—A tenant in common in possession of the property who pays off a mortgage thereon may enforce contribution against an execution purchaser of his cotenant's interest who is chargeable with notice of such payment. (p. 339.)

COTENANTS—Contribution Against Execution Purchaser.—A tenant in common who has paid off a mortgage on the property is not bound to attend an execution sale of his cotenant's interest in the property and notify prospective purchasers of his right to contribution, in order to preserve such right as against them. (p. 339.)

COTENANTS—Contribution for Improvements.—A cotenant who is a disseisor is not entitled to contribution for improvements. (p. 339.)

COTENANTS—Rents.—A Cotenant Who is a Disseisor is chargeable with the rental value of his co-owner's share of the property, whether the rent is actually collected by him or not. (p. 339.)

Suit for partition of land, which was bought by the plaintiff and H. G. Beadle, subject to certain mortgages. The following year the plaintiff paid these mortgages, and during the same year the State Bank of Thompson obtained a judgment against Beadle, which became a lien on his undivided interest in the property. In 1900 the judgment was assigned, and Beadle's interest was sold under execution to the assignee. The certificate of sale was assigned to the defendant, who thereafter received a sheriff's deed for an undivided one-half interest in the land. The plaintiff was in the exclusive possession of the property since some time in 1898. The mortgages were not released of record until September 1, 1900, about two months before the execution sale, when someone other than the plaintiff filed releases thereof. The plaintiff, besides his prayer for partition, asked that the defendant be charged with one-half of the mortgage debt paid by him, and that he be given an equitable lien on the defendant's interest for that sum. There was a judgment for the plaintiff, and the defendant appealed.

Oliver Gordon and Cliggitt & Rule, for the appellant.

George D. Peters, for the appellee.

726 **SHERWIN, J.** The plaintiff and Beadle were cotenants of the land in controversy, and the sale of the latter's undivided interest under an execution did not sever the relations, but the appellant, as the purchaser thereof, became himself the cotenant of the plaintiff: 6 Wait's Actions and Defenses, 746, and cases cited. It is the general rule that cotenants are liable for the purchase price of the common property, and for the liens and encumbrances against it, in proportion to their respective interests, and if one cotenant pays off the lien, or pays more than his share thereof, or if he pays more than his share of the purchase price, he is entitled to contribution from his cotenant for his proportion, and has a lien upon the property to secure the payment thereof: *Oliver v. Montgomery*, 39 **727** Iowa, 601; *Sears v. Sellew*, 28 Iowa, 501; *Koboliska v. Swehla*, 107 Iowa, 124, 77 N. W. 576.

We do not understand that these general rules are questioned by the appellant, but he does contend that, having purchased at a judicial sale, without actual or constructive notice that the mortgages had been paid by the plaintiff, and that he was entitled to contribution therefor, he is not liable. The maxim of *caveat emptor* unquestionably applies to a sale under execution, and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien attached: *Rakestraw v. Hamilton*, 14 Iowa, 147. But while this is true, and the purchaser takes his title subject to the liens and equities it was subject to in the hands of the defendant in execution, it is also true that the purchaser will ordinarily be protected against outstanding equities of which he had no notice, actual or constructive, before the sale: *Butterfield v. Walsh*, 36 Iowa, 534, and cases cited. In *Stover v. Cory*, 53 Iowa, 708, 6 N. W. 64, we applied this rule to the case of a cotenant who had paid taxes on the land before the other cotenant bought, and denied recovery therefor. On the other hand, we held in *Pinckney v. Collie*, 114 Iowa, 441, 87 N. W. 406, that section 2925 of the Code was not applicable to the case of a purchaser without notice at an execution sale of the interest of an heir in the estate of his intestate, where there had been an advancement to him during the life of the ancestor. The rule thus announced, and the reasoning upon which it is based, seem applicable to the case at bar, for here the mortgages were in fact recorded; and, upon their payment by the plaintiff, he could have recorded no instrument which would have affected the estate, within the meaning of the statute. He had no right to pay the mortgages and take an assignment of them for the purpose of subrogation, because he was a cotenant, and could not acquire or hold an outstanding encumbrance as against his cotenant: *Leach v. Hall*, 95 Iowa, 619, 64 N. W. 790.

⁷²⁸ Eliminating the statute, the case would be governed by the controlling equities. It is unnecessary, however, to apply the rule of the *Pinckney* case here, because of the facts. At the time the defendant purchased the certificate of sale he was a nonresident of the state, and was not present at the sale of the land. The land was sold to *Bringhoff*, who, though he had taken an assignment of the judgment, was in reality not the owner thereof, but undertook its collection for a commission. *Bringhoff* assigned the certificate in blank, delivered it to the bank, and received his commission before the sale thereof to the defendant. *Mr. Vaughn*, the cashier of the bank, was the de-

fendant's agent for the transaction of his business in that locality, and for the purchase of the certificate in question. He knew or was charged with knowledge of the fact that the mortgages had been paid, and that their release had been secured by his agent, Bringhoff. Furthermore, he knew that Beadle was insolvent and could not have paid them, and that the plaintiff was in exclusive possession of the property, and timely inquiry would undoubtedly have acquainted him with the plaintiff's equities; and this, we think, good faith and reasonable prudence required him to make in the circumstances of this case: *Rogers v. Hussey*, 36 Iowa, 664; *Hannan v. Seidentopf*, 113 Iowa, 658, 86 N. W. 44.

There is nothing in the claim that the plaintiff is estopped because he knew of the judgment, and that the interest of Beadle was to be sold. He was not bound to attend the sale and notify prospective purchasers of his right to contribution. He did not then know that the mortgages had been released, and could justly rely upon the notice which the record and his possession of the property gave to the world. Moreover, the releases having been procured and placed upon record by the defendant's agents without the knowledge or consent of the plaintiff, he is in no position to charge the plaintiff with an estoppel on account thereof.

⁷²⁹ The evidence does not show a merger of the plaintiff's equity in the legal title which he afterward acquired from Beadle. On the contrary, the facts negative any such intent, and the intention of the parties will ordinarily determine the question in equity.

The plaintiff is not entitled to recover for improvements made. He does not claim anything therefor in his pleading nor in argument, and, as we understand the record, he was a disseisor, and for that reason alone he is not entitled to contribution for the improvements: *Austin v. Barrett*, 44 Iowa, 488.

It is also the rule that a disseisor is chargeable with the rental value of his cotenant's share of the property, whether the rent is actually received by him or not: *Austin v. Barrett*, 44 Iowa, 488; *Sears v. Sellew*, 28 Iowa, 501. This seems to have been the view of the trial court, and we are not disposed to interfere with the fact findings as to the value thereof.

The allowance for sidewalk and curbing will be deducted from the amount found due the plaintiff, and as thus modified the judgment will be affirmed. The case will be remanded for a judgment in accordance herewith, or the plaintiff may have a

decree here if he elects so to do within twenty days from the filing of this opinion.

Modified and affirmed.

A Person Deriving Title from One Cotenant becomes a tenant in common with the other cotenant: *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585; *Welch v. Clark*, 12 Vt. 681, 36 Am. Dec. 368. See, too, *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422.

A Tenant in Common Who Pays Off a Lien on the joint property is entitled to contribution from his cotenants to the extent of their respective interests; and a court of equity, to secure such contribution, will enforce upon the interests of the cotenants an equitable lien of the same character as that which has been removed: *Moon v. Jennings*, 119 Ind. 130, 12 Am. St. Rep. 383. See, too, *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691, and cases cited in the cross-reference note thereto.

DEMPSTER MANUFACTURING COMPANY v. DOWNS.

[126 Iowa, 80, 101 N. W. 735.]

CORPORATIONS, Lien of on Shares of Stock.—At the common law a corporation had no lien upon the shares of its stockholders for debts due from them to it. (p. 341.)

CORPORATIONS, Lien of on Stock.—By Its Articles of Incorporation a corporation may reserve a lien in its favor on all shares of its stock for the holder's liability to it, and such lien is enforceable against a transferee of stock without actual notice of the indebtedness or the contents of such articles. (p. 343.)

Dale & Harvison, for the appellant.

Dudley & Coffin, for the appellee.

⁸¹ LADD, J. The Dempster Manufacturing Company was incorporated September 1, 1897, with a capital stock of one hundred thousand dollars, divided into shares of one hundred dollars each. Of these, ten shares were issued to the defendant, E. S. Downs. The certificates were to the effect that the shares were "fully paid and nonassessable, transferable only on the books of the corporation in person or by attorney on surrender of the certificate," and the eighth article of incorporation reads, "The corporation shall have a lien upon the stock of any holder thereof for the amount of his liability to the corporation, and this lien shall not be discharged by a transfer of the stock except on a written resolution of the board of directors authorizing the transfer." On the eighteenth day of September, 1900,

for full consideration, Downs executed his note to the company for four hundred and thirty-one dollars and thirty-five cents, payable in one year, at six per cent interest. In April, 1901, he entered into a contract with the company under which he was to handle its goods at New Ulm, Minnesota, on condition that these remain the company's property until paid for, and that the proceeds belonged to it. Goods on hand were returned to the company in the fall, and he is shown to have been indebted to it for a balance of two hundred and forty-nine dollars and seven cents on December 12, 1901. Though questioned, the existence of the indebtedness of the company, not as assignee, as stated, is fully established by the evidence. On the twenty-first day of January, 1902, a dividend of fifty dollars was declared on the stock, and this was applied by the company on the account. On the other hand, Downs borrowed two hundred dollars of the Citizens' Bank of New Ulm, Minnesota, on the twenty-ninth day of July, 1901, and, to secure the same, indorsed each certificate of five shares of stock:

"For value received, I hereby sell, assign and transfer unto M. Mullen the five shares of the capital stock represented by the within certificate and do hereby irrevocably constitute M. Mullen my attorney to transfer the stock on the books of the within named corporation with full power of substitution in the premises.

"Dated July 29, 1901.

E. S. DOWNS."

⁸² Another loan of two hundred dollars was procured in the same way August 14th following; another, of three hundred dollars, September 12th; and on October 12, 1901, still another, of fifty dollars. These loans were made in reliance upon the stock as security, and without any actual notice of the provisions of article 8 or of the plaintiff's claims. Neither did the company have any knowledge whatever of these loans, or of the assignment and delivery of the certificates, until so advised by a letter from Mullen dated December 21, 1901.

The only question raised by the record is whether the plaintiff is entitled to enforce a lien for the indebtedness of Downs to it against the stock. At common law a corporation had no lien upon the shares of its stockholders for debts due from them to the company. Secret liens, as they impede the safe and speedy transfer of property, are always discouraged; and courts uniformly refuse to enforce the same, as against stock, unless created by statute, charter, or by-law of the company:

Farmers' & Merchants' Bank v. Wasson, 48 Iowa, 336, 30 Am. Rep. 398. Our statutes are silent on the subject, but the powers which may be exercised by a corporation in effecting its objects are as broad and comprehensive as those of an individual unless expressly prohibited: *Thompson v. Lambert*, 44 Iowa, 239. See Code, secs. 1607, 1609. Corporations are formed in this state by the adoption of articles of incorporation in pursuance of the general laws enacted by the legislature, and such articles, in connection with the statutes, answer the same purpose as a special charter. They contain the terms of agreement between the company and its stockholders, and indicate the business to be transacted, and also the grant from the state of the franchise or right of forming the corporation and attaining the objects contemplated. The same rules of construction apply to articles of incorporation so adopted in pursuance of general laws as to charters granted by the special acts of the legislature: *State v. Central Iowa Ry. Co.*, 71 Iowa, 410, 60 Am. Rep. 806, 32 N. W. 409; *Morawetz on Private Corporations*, sec. 318. ⁸³ Provisions in special charters granted by the legislature, declaring any indebtedness owing by the stockholder to the corporation a lien on his stock, are not unusual, and are enforced by the courts: *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, 4 L. ed. 269. A similar provision, when embodied in articles of incorporation, is neither inconsistent with the statutes, nor opposed to public policy. By accepting the stock in the corporation every stockholder assents to the terms and conditions found in the articles. Such lien is not prohibited, and may be created by the articles of incorporation: *Bradford Banking Co. v. Briggs & Co.*, 31 Ch. D. 19; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Bohmer v. City Bank of Richmond*, 77 Va. 445; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; 1 *Cook on Stock and Stockholders*, sec. 522; *Hillwell on Stockholders*, sec. 166. Whether this may be accomplished by the enactment of a by-law is a controverted question, concerning which the authorities are in sharp conflict, but this court is committed to the doctrine that such power exists: *Farmers' and Traders' Bank v. Haney*, 87 Iowa, 101, 54 N. W. 61; *Des Moines Nat Bank v. Warren County Bank*, 97 Iowa, 204, 66 N. W. 154. The main contention is that, though the lien existed as between the company and the stockholder, this would not affect the interest in the stock acquired by a third person without notice. That such is the rule with respect to liens created by by-laws was recognized in the decisions

last cited. The by-laws of a private corporation are not in the nature of legislative enactments, so far as third parties are concerned. They are mere regulations or self-imposed rules for the management and control of the corporate affairs, and are not usually intended for strangers who do not subject themselves to their influence. But it is different with the provisions of the charter. The corporation is created by the adoption of the articles. These form the very basis of its existence. Everyone who deals with it or its stock is charged with knowledge of their contents. To the end that the greatest publicity may be attained, as a ⁸⁴ condition precedent to commencing business they are required to be recorded in the office of the recorder of deeds in the county where its principal place of business is to be kept, and filed and recorded with the Secretary of State. Counsel concede that where the lien is created by a general statute, or the provision therefor is a part of a special charter granted by the legislature, it is enforceable against the whole world. This is because all are charged with knowledge of the law as contained in the public acts of the legislature. For the same reason everyone who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording the articles is to give them the same publicity, as nearly as may be, as statutory charters, and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders, and inhere in the certificates of stock, in whose-soever hands they may come. The certificates are undoubtedly continuing assurances of ownership, but the ownership is such as is stipulated in the articles. Says Morawetz in his work on Corporations: "If the lien is provided by the company's charter or articles of association, or by general law, all persons purchasing shares are bound thereby, and must, at their peril, inquire of the company's officers whether the holders of the shares are indebted to it or not": See, also, Jones on Pledges, sec. 221 et seq. Moreover, section 1626 of the Code provides that "the transfer of shares is not valid, except as between the parties thereto, until regularly entered upon the books of the company"; and, in construing this language in *Ottumwa Screen Co. v. Stodgill*, 103 Iowa, 437, 72 N. W. 669, the court held that such invalidity was not dependent on the absence of notice. In

the instant case, however, the entire indebtedness to plaintiff had accrued prior to any information of the transfer to ⁸⁵ Mullen reaching the company. We think the interest so acquired was subject to the lien of the company for the indebtedness owing it, and that this attached to the dividend declared during its existence: Angell and Ames on Corporations, sec. 355; 2 Cook on Corporations, sec. 526.

Affirmed.

No Lien Exists, at the common law, in favor of a corporation upon the stock of a shareholder to secure a debt due by him to the company: Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412; Boyd v. Redd, 120 N. C. 335, 58 Am. St. Rep. 792. As to whether a lien created by statute, charter, or by-law on corporate stock is enforceable against a bona fide purchaser or pledgee, see Bank of Cullo-den v. Bank of Forsyth, 120 Ga. 575, 102 Am. St. Rep. 115; Stafford v. Produce etc. Banking Co., 61 Ohio St. 160, 76 Am. St. Rep. 371; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 70 Am. St. Rep. 309; Bank v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396.

McLAUGHLIN v. AMERICAN FIRE INSURANCE CO.

[126 Iowa, 149, 101 N. W. 765.]

INSURANCE, Incorrect Reporting of Risk by Agent.—If an agent fails to correctly report a risk, the company, and not the insurer, is chargeable with the omission. (p. 345.)

INSURANCE, Agent's Authority to Correct Policy After a Loss Occurs.—Where, by the mistake of an agent in issuing a policy, words are omitted necessary to make it embody the contract of insurance, such words may be subsequently inserted by him even after a loss occurs. Hence, if by mistake he fails to attach a slip covering loss by lightning, he may attach it after such loss, if the policy remains in his possession. (p. 345.)

INSURANCE, Agent, Continuance of Authority Until Delivery of the Policy.—Until the written policy is made to conform to the contract for insurance, it is not a completely executed contract, and the agent retains authority, the policy still being in his possession, to correct it so as to conform to such contract. (p. 346.)

Dudley & Coffin and J. E. Corlett, for the appellant.

M. X. Geske and D. D. Murphy, for the appellee.

¹⁵⁰ **McCLAIN, J.** The loss of which recovery was sought was by lightning, and the defense was that the policy did not cover such loss. It appeared without substantial conflict in the evidence that the insured applied to the recording agent

of defendant for a policy covering loss by both fire and lightning, and that the agent, having authority to contract for insurance on behalf of defendant, agreed that such policy should be issued, the risk to attach from the time the contract for insurance was made; that the recognized method of doing business by the agent in behalf of the defendant was to attach to the form of a policy which did not cover loss by lightning a slip containing the usual lightning clause; that the policy was made out by the agent without such slip being attached thereto, and was held by him without delivery to the insured until after the loss occurred, when, noticing the omission to attach the slip containing the lightning clause, he then attached such slip to the policy and delivered it to the insured; and that he had full authority to issue policies with the lightning slip attached, and omitted to do so in this particular case through an oversight.

There is some contention on the part of the appellant that the risk was reported by the agent to the defendant company without mentioning the lightning clause, but it appears that what was reported was the continuance of the risk under a previous policy, and it does not appear in evidence whether such previous policy contained the lightning clause or not. But this we think immaterial. The agent had authority to contract for insurance on behalf of defendant, and to issue policies containing ¹⁵¹ the lightning clause, and in this case it appears that he did contract for such insurance. It was not a matter with which the insured was chargeable that the risk was not correctly reported to the company. If the agent failed correctly to report the risk, the company, and not the insured, was chargeable with the omission.

The substantial contention for the appellant is that the agent had no authority to vary the terms of a contract of insurance fully made and executed, evidenced by a written policy; and that, if by mistake the policy did not embody the agreement of the parties, the remedy of the insured was to bring an action in equity for reformation, and that he could not bring his action at law on a written policy and recover on proof of a different contract from that contained in the policy. It is not necessary, however, to elaborate the discussion of this question. We have held that where, by mistake of the agent in issuing the written policy, words have been omitted necessary to make it embody the binding contract for insurance, such words may be inserted by the agent, even after the loss has occurred: Taylor

v. State Ins. Co., 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577. In that case we went further than it is necessary to go in the case before us in recognizing the power of the agent, for there the policy had been delivered to the insured, and was corrected after such delivery and after the loss, while here the policy had never been delivered, and the insured was not therefore, as we think, chargeable with knowledge of the terms of the instrument.

Counsel contend that, as the policy was allowed by the insured to remain in the custody of the agent after it was ready for delivery, such agent became his agent, and was no longer the representative of the company; but, conceding this to be true, the case is not taken out of the rule announced in *Taylor v. State Ins. Co.*, 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577. Until the written policy was made to conform to the contract for insurance, it was not a completed execution of ¹⁵² that contract, and did not relieve the company from liability under that contract. Until the agent had completely executed his authority by issuing a policy embodying the terms of the binding contract, his authority to issue a policy of insurance continued. Of course, when a written instrument is fully executed, it is presumed to embody the agreement of the parties, and any prior or contemporary oral agreement is merged therein; but if, by reason of mistake, it does not conform to the prior oral agreement, we see no reason for recognizing such a merger. It is not necessary, however, to elaborate the arguments, for we think the rule is settled for this state in the case already cited, and we have no inclination to reconsider the conclusion there announced. This is decisive of the present case, and the judgment of the trial court is affirmed.

The Principal Case is supported by *Taylor v. State Ins. Co.*, 98 Iowa, 521, 60 Am. St. Rep. 210. See, however, *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

BARTO v. IOWA TELEPHONE COMPANY.

[126 Iowa, 241, 101 N. W. 876.]

ELECTRIC CORPORATIONS, Liability of for Acts of Others.

Where electric appliances are placed on the poles of a telephone corporation without its consent, but remain there more than a year, it must be deemed to acquiesce, and is hence liable to its employes for injuries due thereto. (p. 349.)

ELECTRIC CORPORATIONS, Duty of to Employes.—The duty of providing a reasonably safe place in which to work is an affirmative and continuing duty on the part of an employer, and if a telephone corporation allows an electric light company to use its poles, it must see that they are so used as not to expose employes to perils, the risks of which are not assumed on entering the employment. (p. 349.)

ELECTRICITY, Care Required in the Use of.—Electricity, unless properly handled, is exceedingly dangerous, and those utilizing its agencies cannot complain if a degree of care and skill in the construction and maintenance of the necessary appliances and machinery is exacted commensurate with the dangers involved. (p. 349.)

A TELEPHONE CORPORATION Must be Presumed to have Known what everyone else has observed that linemen, in going up and down poles, take hold of braces and other projections which do not appear to be dangerous, and the corporation in placing wires and apparatus on those poles must take this custom into consideration in guarding against exposing its employes to unnecessary peril. (p. 350.)

TELEPHONE CORPORATIONS—Risks not Assumed by Employes.—A telephone corporation does not assume the risk of coming in contact with any live wire which, in the exercise of ordinary diligence, he does not observe. He is not an inspector, and where there is nothing to show that inspection was a part of his duty, he does not assume the risks of dangers which inspection would have exposed. (pp. 350, 351.)

A. Van Wagenen, for the appellant.

Henderson & Fribourg, for the appellee.

²⁴¹ LADD, J. On the eighteenth day of April, 1901, the plaintiff ²⁴² was employed as lineman by defendant and was engaged in stringing what are called "lead offs," being connections from the main line of telephone wires to residences or places of business of patrons. After ascertaining the wires with which to connect a laundry near the intersection of Court and Fourth streets he advised the wire chief, and was informed that a certain telephone was connected with a metallic circuit when it should have been a common return. In a metallic circuit two wires run all the way from the telephone to the

central office, while in a common return one wire runs from the office to the telephone, and the current travels back over a wire common to several telephones, sometimes called the "McClure" wire. Plaintiff, in proceeding to remedy the defect, climbed the pole on which, about thirty feet from the ground, were two crossbars, and above these a "hickey" had been placed by the Sioux City Electric Light Company. A "hickey" consists of two iron strips fastened to the pole extending above its end, supporting a crossbar. On this crossbar there were two electric light wires of one hundred and ten volts, and two primary wires, connecting alternating currents of one thousand and fifty volts each. A wire tapped one of these and ran down to the middle bar, and, after being wound around a peg, onto the fuse box, which was attached to the lower crossbar west of the post, and over the end of a supporting brace extending from the pole to the crossbar. This fuse box was six inches long by three or four inches wide, and is described as "fusible plug down in a receptacle to blow out or melt out in case of a short circuit on the line." A substance of lower conductivity than the wire is placed in it, and melts when two wires come together. A converter was attached to the north side of the pole, the top of it at the middle of the lower crossbar. This was about eighteen inches high and twelve or fifteen inches wide. Its purpose was to convert the current from a higher into others of lower voltage. In this instance ²⁴³ the current passing into a store near by was reduced to one hundred and four volts. A connecting coil, about one and one-half inches in diameter, of wire three thirty-seconds of an inch thick, extended from the fuse box to the converter. Back of this wire was the iron brace previously mentioned, and as the coil was longer than seems to have been necessary it is supposed to have been blown back and forth by the wind against the brace until the insulation wore from the wire. The telephone wires were stretched over the middle and lower crossbars, save the common return, which was attached to a bracket fastened on the east side of the pole at the lower end of the brace supporting the middle crossbar. The plaintiff cut the return wire of the metallic circuit and attached it on the common return, which was on the bracket. He then had hold of the bracket with one hand, and in descending grasped the iron brace of the wire coil connecting the fuse box and the converter, when, as the evidence tended to show, he was struck by a current of electricity and fell to the earth.

1. The hickey, electric light wires, fuse box, and converter were placed on the pole without the defendant's consent, but, as these had remained thereon more than a year, it may well be assumed to have been done with its acquiescence. That they were so placed by another company did not relieve the defendant of its duty to take reasonable precautions for the safety of its employes. Though the lineman is of necessity exposed to unusual dangers, it is the duty of the employer to see that the place where he is to perform his work is, in view of the situation, reasonably safe; that is, shielded from such perils as an ordinarily prudent and skillful man would, under like circumstances, guard against, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence. In other words, the obligation to provide the employe a reasonably safe place to work is an affirmative and continuing duty on the part of the ²⁴⁴ employer. If the defendant chose to allow the electric light company to use its poles, it became its duty to see that these were not so used as to expose the telephone company's employes to perils the risk of which was not assumed in entering such hazardous employment: See *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Cherokee etc. Coal Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100; *Trainer v. Philadelphia etc. R. R. Co.*, 137 Pa. St. 145, 20 Atl. 632.

Counsel have stated in eloquent terms the advantages of electricity. The power supplied by it and manifested in different ways is now in common use. Its economic advantages are immeasurable. Its possibilities are inconceivable. But unless properly handled it is also exceedingly dangerous, and those utilizing the agency cannot complain if a degree of care and skill in the construction and maintenance of necessary apparatus and machinery is exacted commensurate with the dangers involved: *McAdam v. Central R. & E. Co.*, 67 Conn. 445, 35 Atl. 341. See *Overall v. Louisville E. & L. Co.*, 20 Ky. Law Rep. 759, 47 S. W. 442. Such is the rule with respect to other instrumentalities, and no reason can be suggested justifying an exception in favor of electricity.

The wire coil connecting the fuse box with the converter could easily have been so hung as not to have come in contact with the iron brace, and so adjusting it that the insulation would be likely "by raking" against the brace to wear off might well have been found to have been improper construction. It was as though an uninsulated wire had been left in direct contact

with the brace. Of course the covering might have been expected to wear off, but when wires are so placed that this may occur at short intervals, because of coming in contact with other material, and where loss of insulation renders them dangerous, inspection should be made with such frequency ²⁴⁵ as appears reasonably necessary to discover and remedy defects, to the end that injury may not result therefrom. The lineman necessarily ascended on the opposite side of this pole, and when in that position his view of the wire was obstructed by the location of the fuse box, converter, crossbar, and brace, and he would not be likely to search for a wire on the other side, not fastened to, but swinging against, the brace, especially if ignorant of the mechanism of the fuse box and converter. The defendant must be presumed to have known, what everyone else has observed, that linemen in going up and down poles take hold of the braces and other projections which do not appear to be dangerous, and in placing or permitting others to place wires and apparatus on these poles should have taken this custom into consideration in guarding against exposing its employes to unnecessary peril; and whether it did, in view of all the circumstances, exercise ordinary care and skill in so doing, was for the jury to decide.

2. That plaintiff assumed the risks incident to his employment no one questions. Had he been an inspector, or had the inspection of the poles and wires been a part of his duties, there would be much force in appellant's contention that he should be held to have known what it was his duty to ascertain: See *Anderson v. Inland Telephone & Tel. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Chisholm v. New England T. & T. Co.*, 176 Mass. 125, 57 N. E. 383; *Bergin v. New England Tel. Co.*, 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 195; *New Omaha T. H. E. L. Co. v. Rombold (Neb.)*, 97 N. W. 1030. But he was not an inspector, and the record is void of any evidence upon which it could have been found that inspection was a part of his duty. True, he was required to report any defects he might observe, but he was not directed to look for them; was not furnished with any apparatus to test live wires; did not ²⁴⁶ know how, and was even ignorant of the method of testing by touching with the end of his fingers. Indeed the testimony tended to show that this was the only telephone pole in the city with a converter and fuse box attached to it, and that, though plaintiff appreciated the danger of coming in contact with electric wires, he had had no experience in pro-

tecting himself from them. Doubtless he did assume the risk of coming in contact with any wire which in the exercise of ordinary diligence he should have observed. But he was without knowledge of the mechanism of the converter and fuse box, and, as the connecting wire was concealed from view, cannot be held to have been negligent, as a matter of law, in not discovering it. If not charged with knowledge of the danger, it seems unnecessary to say that he cannot be held to have assumed the risk.

3. What has been said practically disposes of the contention that plaintiff was conclusively shown to have been guilty of contributory negligence. The additional element is the fact that he carried an insulating tape with which he might have wound the joint made by the lead-off wire with the common return. Had he done this he would not have been injured. Had he taken hold of the brace on the other side he would have escaped. He could have steadied himself by placing his arm about the pole. One of the pegs might have proven a safe handhold. Had he foreseen the danger of seizing the brace, another expedient would doubtless have been adopted. But he did not, and the other things he might have done are important only in determining whether he was guilty of any negligence in taking the course he adopted. Would a prudent man with one hand on the bracket, connected by a wire with the earth, situated as plaintiff was, have grasped the iron brace? He had been working with the return wire, which appeared to be safe, and as there was ground for concluding that he had no reason ²⁴⁷ to suspect that the brace was in contact with a live wire, the question of his negligence was an open one for the determination of the jury.

The rulings on the admissibility of evidence were correct, and the instructions refused, in so far as correct, were included in those given, which, when considered together, are not subject to the exceptions urged.

Affirmed.

The Duty and Liability of Electric Corporations to their employes are discussed in the monographic note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 537. As to the duty and liability generally of such corporations, see the recent cases of *Cumberland Tel. etc. Co. v. Martin*, 116 Ky. 554, 105 Am. St. Rep. 229; *Parsons v. Charleston etc. Ry. Co.*, 69 S. C. 305, 104 Am. St. Rep. 800; *Chretien v. New Orleans Ry. Co.*, 113 La. 761, 104 Am. St. Rep. 519.

STATE v. CARMEAN.

[126 Iowa, 291, 102 N. W. 97.]

EMBEZZLEMENT, as Generally Defined in the Statutes, Consists of the fraudulent conversion or misappropriation of property received in a fiduciary capacity. (p. 355.)

CORPORATIONS, Civil and Criminal Liability of Officers of.—To a Third Person who intrusts his money to a corporation, its officers are not liable civilly nor criminally, unless, by some act or neglect on their part, the money is lost or misappropriated. (p. 355.)

CORPORATIONS, Criminal Liability of Officers of.—One Officer of a Corporation is not Criminally Liable for the Acts of Another, nor for the acts of subordinates, unless such acts are by his direct authority and in the execution of a criminal purpose on his part. (pp. 356, 357.)

CORPORATIONS, Criminal Liability of Officers of for Fraudulent Misappropriation of Moneys.—Before an officer of a corporation can be held criminally liable for so planning and conducting its business as to result in a fraudulent misappropriation or conversion of the moneys of a third person intrusted to it, it must be shown that such course of business was either in its essential characteristics illegal and devised and carried on for purposes having a criminal result, or that, with his knowledge and under his direction, it was so carried on in the particular case as to effect such result. (p. 357.)

CRIMINAL PROSECUTIONS, Evidence of Other Transactions, When Inadmissible.—In the prosecution of an officer of a corporation for the embezzlement of money intrusted to it, evidence for the purpose of showing the general course of business carried on under his direction, consisting of the discounting of notes and the use of accommodation paper, is inadmissible where there is no claim that these transactions were unlawful, nor that the purpose of carrying them on was the misappropriation of money. (p. 358.)

EMBEZZLEMENT Without Criminal Intent.—An instruction, where an officer of a corporation was on trial accused of embezzlement, that the fraudulent conversion of property or money of another is the voluntary commission of an act the inevitable effect of which is to deprive the true owner of his money or property, and that a criminal intent may be inferred from the commission of such an act, and if the defendant had knowledge of the fact or means of knowing from the manner in which the business of the corporation was done or his books kept, that such system of business inaugurated by him and pursued under his direction would result in the money of third persons being improperly applied and thereby lost to them, that he would be guilty of the crime charged, is erroneous, because it tends to sanction a conviction for a crime without any evidence, either of a criminal act or criminal intent on the part of the accused. (p. 358.)

CRIMINAL LAW, Evidence of Other Crimes.—Evidence with reference to other transactions, though criminal, cannot be received unless they tend to establish the criminal intent of the accused with reference to the crime charged against him. (p. 358.)

CORPORATION, Embezzlement of Officer of.—An officer of a corporation cannot be guilty of embezzlement of funds intrusted to it when he did not receive such funds, nor have any knowledge of their misappropriation, nor intentionally failed to apply them to the purposes for which they were received. (p. 359.)

EMBEZZLEMENT.—A Criminal Intent must be shown to sustain a conviction for embezzlement. (p. 359.)

CORPORATION, Books of, When not Admissible as Evidence.—On the trial of an officer of a corporation on a charge of embezzlement, entries in its books made by clerks in the course of their employment, but without his direction or knowledge, are not admissible. (p. 360.)

EMBEZZLEMENT, Value of Property Misappropriated.—In a prosecution for embezzlement under the statutes of Iowa, the jury should find the value of the property misappropriated. (p. 360.)

J. L. Carney, for the appellant.

Charles W. Mullen, attorney general, and Lawrence De Graff, assistant attorney general, for the state.

²⁹² **McCLAIN, J.** Defendant was the president and treasurer of the Rhoades-Carmean Buggy Company, a corporation doing business at Marshalltown, and engaged in the manufacture and sale of carriages and other vehicles. This corporation will be referred to in the opinion as the "company." In November, 1901, the firm of Roemer & Miller, doing business at Hampton, Iowa, entered into a commission contract for the sale of vehicles for the company, and thereafter ²⁹³ received consignments for which they executed notes, with the arrangement that such notes should be paid as the carriages were sold, the notes to be extended from time to time until sufficient sales were made to satisfy them, and the time within which each consignment should be sold being limited by the contract. In December, 1901, Roemer & Miller executed certain notes, five in number, for a consignment of vehicles, which notes were indorsed by the company and transferred to one Meickley. Subsequently, by remittances, which were to be applied as directed, in part on open account and in part on these notes, two of these notes were taken up, the company giving receipts at the time for the remittances, and subsequently paying off the notes in the hands of Meickley, and returning them to Roemer & Miller. In June, 1902, Roemer & Miller sent to the company a draft for \$925.91, for which they asked credit, on account and notes, for \$974.64, the difference between the amount of the draft and the amount of the credit asked being a discount of \$48.74, to which they were entitled under their contract, and then

directed that, out of the amount sent, \$385.50 be applied on the notes given in December, and \$585.15 on open account. This draft came into the hands of the clerks of the company in the transaction of their usual business, and credit was given to Roemer & Miller, as asked, for the amount to be applied on open account; but as the notes were not in the hands of the company, but in the possession of Meickley, they were not immediately taken up, and, in September following, these notes being still unpaid, the company made an assignment, and immediately afterward went into bankruptcy. The notes in the hands of Meickley were enforced, as against Roemer & Miller, and the defendant is charged with the embezzlement of the sum of \$385.50 belonging to Roemer & Miller, which should have been applied to the payment of the notes.

It is not claimed that the money which defendant is charged to have embezzled was intrusted to him personally ²⁰⁴ by Roemer & Miller, or came into his hands, nor that he had any personal knowledge of its receipt, nor that he made any direction as to its disposition, nor that he derived any personal benefit from its misappropriation. Indeed, it is fully conceded that, except as defendant may be chargeable with the general conduct of the business of the company, he is in no way liable, civilly or criminally, for the failure to apply this sum of \$385.50 to the payment of notes in Meickley's hands. We come, therefore, directly to the question whether defendant can be held criminally accountable for the failure of the clerks and servants of the company to apply this sum of money in the satisfaction of the notes which it was sent to pay.

The crime of embezzlement is essentially a statutory offense. The provisions of the section of the code defining it are as follows:

"Sec. 4842. If any officer, agent, clerk or servant of any corporation or voluntary association, or if any clerk, agent, or servant of any private person or copartnership, except persons under the age of sixteen years, or if any attorney at law, collector or other person who in any manner receives or collects money or other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle or convert to his own use, without the consent of his employer, master or the owner of the money or property collected or received, any money or property of another, or which is partly the property of another

and partly the property of such officer, agent, clerk, servant, attorney at law, collector or other person, which has come to his possession or under his care in any manner whatsoever, he is guilty of larceny. If money or property is so embezzled or converted by a series of acts during the same employment, the total amount of the money and the total value of the property so embezzled or converted shall be considered as embezzled or converted in one act, and he shall be punished accordingly."

Although this section in terms provides that any officer of a corporation receiving or collecting money for the use ²⁹⁵ of or belonging to another, who embezzles or fraudulently converts it to his own use, is guilty of embezzlement, nevertheless the plain purpose of the statute is to provide, with reference to the officers of corporations, that they shall be criminally liable for the fraudulent conversion of the money or property of the corporation, just as agents, clerks, or servants of a private person are liable for a like fraudulent conversion of the money or property of their employers, or as any person who receives money or property for the use of and belonging to another is criminally liable for fraudulent conversion to his own use of money or property thus intrusted to him. The purpose of the statute is to punish those who in a fiduciary relation receive and fraudulently convert money or property intrusted to them, or which comes into their hands by virtue of such relationship. The crime of embezzlement, as generally defined by the statutes, consists essentially of the fraudulent conversion or misappropriation of property received in a fiduciary capacity: *State v. Roubles*, 43 La. Ann. 200, 9 South. 435, 26 Am. St. Rep. 179; *United States v. Harper* (C. C.), 33 Fed. 471; *State v. Johnson*, 49 Iowa, 141; *State v. Hengen*, 106 Iowa, 711, 77 N. W. 453; *State v. Engle*, 111 Iowa, 246, 82 N. W. 763; 2 *Bishop's Criminal Law*, sec. 325. To a third person who intrusts his money to a corporation, an officer of the corporation is evidently not liable, civilly or criminally, unless by some act or neglect on his part the money is lost or misappropriated; and in view of the concession that defendant did not, through any personal act of his, misappropriate or cause the misappropriation of the particular sum of money intrusted to the company for the payment of the notes above referred to, we are led to the inquiry, What act or omission of defendant with reference to this money was criminal?

The indictment charges that defendant (not as officer of a corporation, but individually) did unlawfully, etc., steal and

take \$385.50 of the property of Roemer & Miller, with intent on his part to deprive them of the same, and convert ²⁹⁶ the same to his own use and the use of the company, without the knowledge or consent of Roemer & Miller; but in describing the method in which the crime was committed, the indictment further recites that defendant was the president and treasurer of the company and financially interested therein as stockholder, and had charge of its business, with full knowledge of its affairs and system of business, and details the transactions already referred to between the company and Roemer & Miller, and then alleges that the money received by the company was wrongfully and fraudulently, and with intent to convert the same to the use of the corporation and deprive Roemer & Miller thereof, appropriated by defendant to the uses of the corporation, all with the knowledge, consent, and direction of said defendant, and by means of the system of business by him organized. From the allegations thus briefly epitomized it is evident that the intention was to charge defendant with a crime, either by reason of the general supervision which he, as president and treasurer of the corporation, had the power to exercise, and should have exercised, over the conduct of its business, or by reason of his having planned or had knowledge of the course of business, in consequence of which this money was lost to Roemer & Miller. If the first portion of the indictment directly charges personal misconduct of defendant as an individual with reference to money received by him from Roemer & Miller, its allegations in this respect are wholly unsupported by the evidence, and need not be further considered; and it is only those allegations by which it is sought to charge some liability upon defendant by reason of his being an officer in the company, and having general supervision of its business affairs and those relating to its methods of business, which we have occasion now to consider.

We are not referred to any authority for the proposition that the officer of a corporation, no matter how great his responsibility, is criminally liable for the acts of the corporation, performed through other officers or agents, in misappropriating ²⁹⁷ money. It is no doubt true that the corporation would be liable for such misappropriation by its officers; but there seems to be no reason for holding that one officer is to be held criminally accountable for the acts of another officer, nor for the acts of subordinates, unless such acts are by his direct authority and in the execution of a criminal purpose on his part. The officer can-

not be criminally liable for the acts of his subordinates in a greater measure than a principal is criminally liable for the acts of his agents or servants, and it is well settled that a principal is not thus liable for the act of his agent or servant, even though done in the general course of the employment, unless they are directly authorized or consented to by him; for the authority to do a criminal act will not be presumed: *State v. Robinson*, 55 Minn. 169, 56 N. W. 594; *State v. James*, 63 Mo. 570; *Hipp v. State*, 5 Blackf. 149, 33 Am. Dec. 463; *State v. Smith*, 10 R. I. 258; *State v. Hayes*, 67 Iowa, 27, 24 N. W. 575; *State v. Eifert*, 102 Iowa, 188, 63 Am. St. Rep. 433, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485.

There is authority for the proposition that where it is made criminal to conduct a business in a particular manner, or where the result of the general method of conducting a business is to create a nuisance, or in similar cases, the principal may be chargeable with the general method of conducting his business, though it is carried on by his agents or servants without his immediate knowledge; but cases of this kind are clearly distinguishable from those in which the offense is in its nature personal, as in the case of larceny, embezzlement, and other crimes involving direct injury to an individual, and in such cases criminal purpose must be alleged.

In order that defendant shall be held liable for so planning and conducting the business of the company as to result in fraudulent misappropriation or conversion of the money of Roemer & Miller intrusted to the corporation, it must, we think, be charged and shown that such course of ²⁹⁸ business was either in its essential characteristics illegal, and devised and carried on for the purpose of effecting a criminal result; or that, with the knowledge and under the direction of defendant, it was so carried on in a particular case as to effect such result. It seems to us that the indictment does not in any of these respects allege the facts necessary to fix criminal liability upon the defendant. And the proof is no stronger than the indictment. There is in this record no evidence of any intention on the part of defendant that this money should be misappropriated.

In this connection we may refer to some rulings in the introduction of evidence of which defendant complains. For the purpose of showing a course of business carried on under the general direction of defendant by which such loss as was occasioned by Roemer & Miller might naturally result, the prosecution was allowed to introduce much evidence with relation

to the method of discounting notes and the use of accommodation paper. It seems to us this evidence was inadmissible, for there is no claim that the transactions themselves thus testified to were unlawful nor is there anything in the evidence to show that the purpose of carrying on the business in this way was to misappropriate money. The view entertained by the trial court seems to have been that, if this course of business was likely to result in some case in the misappropriation of money, and did result in this case in such misappropriation, then the defendant must be presumed to have intended such result; and the jury were instructed, on this theory, that "the fraudulent conversion of property or money of another is the voluntary commission of such an act, the inevitable effect of which is to deprive the true owner of his property or money, . . . and a criminal intent may be inferred from the commission of such an act"; and, further, that, if defendant had knowledge of the fact, or had the means of knowing, from the manner in which the business ²⁹⁹ was done and the books kept by the company, that the system of business of the company, inaugurated by defendant and pursued under his direction, would result in the money of Roemer & Miller not being applied on the notes for the payment of which it was sent, but in its being turned into the cash account of the company, and thereby lost to said Roemer & Miller, defendant would be guilty of the crime charged. Now, we think, that, in the admission of this evidence and in these instructions, the court committed error. It cannot be true that the voluntary doing of an act, the unexpected consequence of which, even though inevitable, is to deprive the owner of his property, there being no intention that the act shall have such result, can constitute the crime of embezzlement; nor that the mere means of knowledge on the part of the officer of the corporation that its method of doing business, sanctioned by him, will in a particular case result in the failure to apply money received to the proper purpose, in the absence of any intention on his part that such result shall follow in such case, will constitute such crime. The difficulty with the whole theory on which the case was tried is that it sanctions a conviction for a crime without any evidence either of any criminal act or any criminal intent on the part of defendant.

As to the evidence received with reference to other transactions, it is pertinent also to suggest that, even though they were criminal, they could not be shown in this prosecution, unless they tended to establish a criminal intent with reference to the

misappropriation of the money of Roemer & Miller: State v. Lewis, 19 Or. 478, 24 Pac. 914; Commonwealth v. Shepard, 1 Allen, 575; Stanley v. State, 88 Ala. 154, 7 South. 273; Lang v. State, 97 Ala. 41, 12 South. 183; People v. Cobler, 108 Cal. 538, 41 Pac. 401. As it is conceded that defendant had no knowledge whatever with reference to the misappropriation of any money of Roemer & Miller, proof of other transactions of a similar character ³⁰⁰ could not have had any bearing on the intent of defendant with reference to this particular transaction. The court explained to the jury that the evidence of other transactions and the method of doing business did not alone show any violation of law and told them that the crime charged must be found, if at all, in the receiving of money by the company, with specific directions to apply upon notes given by patrons of the company, and mingling of such money with the funds of said company; but in this instruction we think the court failed to add to the evidence of a course of business which is conceded to have been legitimate any fact which the jury could find from the evidence tended to show any crime on the part of defendant. The defendant did not receive the money, nor intentionally fail to apply it upon the notes, for he had no knowledge of its receipt.

Perhaps the fundamental difficulty with the theory of the trial court was that he did not consistently bear in mind the general rule that in criminal cases proof of some fact or facts tending to show criminal intent is essential. There is a class of crimes, consisting in the violation of police regulations, in which a criminal intent is said not to be material; but larceny, embezzlement, and other crimes involving willful and fraudulent purpose to injure another are not^o within this class: Kletzing v. Armstrong, 119 Iowa, 505, 93 N. W. 500; State v. Ames, 119 Iowa, 680, 94 N. W. 231; State v. Culver (Neb.), 97 N. W. 1015; Hamilton v. State, 46 Neb. 284, 64 N. W. 965. The cases relied upon by counsel for the state as to this proposition are not in point. They relate to such crimes as the receipt of deposits by a bank officer with the knowledge that the bank is insolvent, and belong to the class of cases as to method of transacting business. The defendant was not charged with any crime of transacting business in an improper manner, but specifically with embezzling the money of Roemer & Miller. The court in one instruction told the jury that felonious intention to convert the money was essential ³⁰¹ to constitute the crime; but in other instructions they were told that the criminal intent might

be inferred from the inevitable effect of the act done, or from opportunity of knowledge as to the conduct of the business; and these facts were not, in our judgment, even if shown, sufficient of themselves to impute criminal intent to the defendant.

One other matter relating to the introduction of evidence should be noticed. The state was allowed, over defendant's objection, to introduce in evidence entries on the books of the company, made by clerks in the course of their employment, without the direction, and even without the knowledge, of the defendant. So far as these entries were relied upon as showing the misappropriation of the money with which defendant was charged, they were not admissible: *State v. Ames*, 119 Iowa, 680, 94 N. W. 231.

The court did not require the jury to find the amount or value of the money or property embezzled by defendant, but, on a general verdict of guilty, imposed a sentence which would be justified only if the money or property embezzled exceeded \$20 in value. The section of the statute already quoted provides that one who embezzles money or property of another, etc., "is guilty of larceny." It is essential, therefore, as in larceny, that the jury find the value of the property stolen; for, without such finding, the court is not possessed of information essential for determining the measure of punishment: *State v. Smith*, 48 Iowa, 595; *State v. Wood*, 46 Iowa, 116; *State v. McCarty*, 73 Iowa, 51, 34 N. W. 606. Perhaps the want of a special finding as to the amount of money appropriated would not in this case require a reversal, as there is no conflict in the evidence on the subject; and no doubt the court was justified in assuming that, if there was any embezzlement, it was of the amount of more than \$20; but in view of the argument for the state, that no distinction as to degrees or measure of punishment is made in ³⁰² the provision relating to embezzlement, and that therefore the amount in value of the property embezzled is not to be taken into account in determining the punishment for that crime, we have thought it proper to say that the value of the property embezzled is of the same significance in determining the punishment as the value of the property stolen where the prosecution is for larceny.

For the errors pointed out, the judgment of the trial court is reversed, and the case is remanded for a new trial.

The Crime of Embezzlement is the subject of a monographic note to *Eggleston v. State*, 87 Am. St. Rep. 19-47. A reference to pages 45 and 46 of this note will show that officers of a corporation may, under the statutes of most of the states, be guilty of embezzling property in their possession. See, too, *McElree v. Darlington*, 187 Pa. St. 593, 67 Am. St. Rep. 592.

EARL v. DLASK.

[126 Iowa, 361, 102 N. W. 140.]

PUBLIC STREETS, Negligence in Maintaining Trapdoor in.—Where the owner of a building and his tenants maintain a cellarway from a traveled street to a basement with a trapdoor therein, which they leave open without railing or guard, they are guilty of negligence, and whether the city is also guilty of a like negligence is a question for the jury depending upon the method of construction and the use made of the streets and the number of times the door had been left open and unguarded, and other relevant facts and circumstances of the case. (p. 362.)

MUNICIPAL CORPORATIONS, Liability of for Open Trapdoor not Approached from the Street.—Where a trapdoor is left open in an areaway not wholly within the street, the fact that a person injured by falling through such doorway did not approach it from the street, but from the abutting property, does not exonerate the city from liability to him, where the opening is such as to constitute a menace to all who use the street. (p. 362.)

NEGLIGENCE, Contributory, Plaintiff, When not Guilty of.—One who, on a dark night, falls through a trapdoor in an areaway on or immediately adjoining a public street is not to be adjudged guilty of contributory negligence because he did not discover the peril before he was injured. He had the right to assume that there were no such pitfalls in a place where he might rightfully travel. (p. 363.)

PUBLIC STREETS, Care to be Exercised in Using.—One is not bound to be looking for hidden dangers in a public street. All that is required of him is that he walk with his eyes open, observing his general course and in the usual manner. (p. 364.)

APPELLATE PRACTICE.—Grounds not Relied on in the Trial Court on a motion to direct a verdict for the defendant are not available on appeal. (p. 364.)

J. M. Hughes and Bingham & Mekota, for the appellants.

Rickel, Crocker & Tourtelott, for the appellee.

362 DEEMER, J. Abutting on what is known as Sixteenth avenue west, in the defendant city, is a building known as No. 73, owned, occupied, and used by the defendants, other than the city, as and for a saloon. The front of the building was about two feet from the street line, but the space, except as we shall hereafter notice, was covered with brick, as was the side-

walk in the street, and there was nothing to mark the exact place of the lot line. Immediately in front of the door to the saloon, which was in the center of the building, was a cement step or flagstone, about three feet wide, and five or six feet long. Immediately to the west of this step was a cellar or areaway, three feet and one inch wide and six feet long, extending along the side of the building, and running out into the sidewalk in the street at least one foot. This cellarway had a trapdoor, which, when closed, was on a level with the street and the lot outside the street. This trapdoor swung toward the building, and, when opened, rested against the side of the building. There were no barriers or railings around this areaway, and nothing to warn travelers of danger when the door was open. This condition had existed for at least two years prior to the time plaintiff received his injuries. At about 7:45 in the evening of March 2, 1903, plaintiff went into the saloon to get a drink; accomplishing his purpose, plaintiff started to leave the saloon, stepped from the door onto the flagstone, and, wishing to go west, started in that direction, and, stepping from the flagstone, ³⁶³ landed at the bottom of the areaway—the trapdoor being open—and received the injuries of which he complains.

The evidence shows that the cellar to this building was used for storing beer and ice, and that the trapdoor for a considerable period had been open at least once, and sometimes twice, a day. There was also testimony which tended to show that this door was frequently left open both day and night before the accident occurred. Some of the witnesses say that they found it open at least three times a week for some months prior to the time plaintiff was injured. There is no doubt this arrangement in its unguarded condition was extremely dangerous. The flagstone and the areaway extended some distance into the street, and there was nothing to denote the line of demarcation between the lot and the street. But for the flagstone, the lot and street were upon a common level, were all improved as a part of the street, and in fact, the sidewalk extended up to the front wall of the building. The trapdoor, when closed was on a level with the street. There were no guards or barriers of any kind to prevent persons from falling into the opening when the door was raised. That the owner of the property and the tenants who used it were negligent, there can be no doubt. Whether or not the city was negligent was a question of fact for a jury, depending, of course, upon the method of construction and use made of the premises, and the number of times the door had been left

open and unguarded, and all other relevant facts and circumstances in the case. This issue was submitted to the jury, and it found all defendants negligent.

But it is contended that, as the areaway was not wholly within the street, and as plaintiff did not approach it from the street, but from abutting property, the city owed him (plaintiff) no duty, and was not guilty of actionable negligence. We cannot agree to this construction. Both the flagstone and the areaway were partially in the street and the opening was such ³⁶⁴ as to constitute a menace to all who might be using the street. When plaintiff stepped from the flagstone he was in the street, and, on account of the use made of that part of the lot and the front of the building, and the nature of the improvements thereon, the defendant city did owe a duty to persons rightfully thereon. Even an excavation entirely outside the street line, but so near thereto as to endanger the traveling public, is held to be a nuisance, and the continuance or maintenance thereof actionable: *Rowell v. Williams*, 29 Iowa, 210; *Smith v. Leavenworth*, 15 Kan. 81; *City of Abilene v. Cowperthwait*, 52 Kan. 324, 34 Pac. 795; *Niblett v. Nashville*, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755; *City Council v. Hafers*, 59 Ga. 151; *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Grove v. Kansas City*, 75 Mo. 672; *Fitzgerald v. Berlin*, 51 Wis. 81, 37 Am. Rep. 814, 7 N. W. 836; *Woods v. Groton*, 111 Mass. 357; *Boucher v. City of New Haven*, 40 Conn. 456. On account of the nature of the defect, it is immaterial that plaintiff was coming out of the saloon to get upon the sidewalk. As soon as he emerged therefrom and attempted to step from the flagstone onto what appeared to be, and in fact was, a part of the street, he was entitled to protection. The case differs from those where one is injured while upon private property in attempting to reach the street. The city in such cases owes the traveler no duty. But when he gets upon the street, or upon what from the nature of the construction appears to be part of the street, he is entitled to the protecting care of the city. It is this which distinguishes the case from *Goodwin v. City of Des Moines*, 55 Iowa, 67, 7 N. W. 411, relied upon by appellants. To all intents and purposes plaintiff was upon the street when he received his injuries.

2. The point most relied upon by appellants for a reversal is that plaintiff was guilty of contributory negligence in not using his senses to discover the defect. There is no evidence that he knew there was a trapdoor at the place in question. He

had a right, therefore to assume that there ³⁶⁵ were no such pitfalls as this at any place where he might rightfully travel. The night was dark, and plaintiff testified that he looked to see where he was going as much as he ever did; that he stepped out of the building naturally, and looked where he was going, and that he did not see the hole, and had no previous knowledge of the cellarway. The trial court submitted the question of plaintiff's negligence to the jury, and it evidently found plaintiff was not negligent. The rule of this court is that the question of contributory negligence is generally for a jury. Even where one has notice of a defect in a sidewalk, he is not for that reason alone negligent in attempting to pass over it. Here there is no evidence that plaintiff had any notice or knowledge of the defect. But it is said that if he had used his senses he would have seen it. This was a question for the jury, and was properly submitted. Of course, one cannot close his eyes and walk blindly and heedlessly into a place of danger. On the other hand, he is not bound to be on the lookout for hidden dangers. All that is required of him is that he walk with his eyes open, observing his general course, and in the usual manner: *Barnes v. City of Marcus*, 96 Iowa, 682, 65 N. W. 984; *Lichtenberger v. Town of Mireden*, 91 Iowa, 45, 58 N. W. 1058; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112. The jury was justified in finding that plaintiff exercised the usual care of persons traveling upon public streets and this is all that is required. An instruction holding plaintiff to too strict a duty in this respect was properly refused, and the ones given by the court were such as have been affirmed by this court in numerous cases. *Mathews v. Cedar Rapids*, 80 Iowa, 464, 20 Am. St. Rep. 436, 45 N. W. 894, sustains our conclusions.

3. Contention is made that the trial court erred in not sustaining defendants' motion for a directed verdict for the city, on the ground that there was no evidence tending to show any negligence on its part. As this was not made a ground for the motion, we have nothing here to consider.

³⁶⁶ 4. Criticism is made of some of the instructions. These are hypercritical in character. The instructions, fairly and properly construed, are not objectionable. It would be of no benefit to the parties or to the profession to set them out, for they relate to matters arising on every such trial, and are the usual ones given in such cases.

There is no prejudicial error in the record, and the judgment is affirmed.

On the Liability of a property owner who maintains a hole in the sidewalk in front of his premises with a trapdoor over it, see *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533; *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327; note to *Griffin v. Jackson Light etc. Co.*, 92 Am. St. Rep. 541. It has been held that a city is liable to a traveler who falls into a hatchway which a house owner has been allowed to locate and maintain in a dangerous position, although the immediate cause of the accident was the negligence of the house owner in not guarding the opening: *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. Rep. 924.

FOOTE v. DE POY.

[126 Iowa, 366, 102 N. W. 112.]

PARENT AND CHILD—Action to Compel the Former to Support the Latter.—It is to be presumed that a father will provide for the maintenance and education of his minor daughter in proportion to his ability and her needs, and until he refuses to do so, neither she, nor anyone for her, has any right of action against him to compel him to make such provision. (p. 367.)

DURESS is a Species of Fraud in which compulsion in some form takes the place of deception in accomplishing an injury, and is either of the person or of the goods of the party. (p. 369.)

DURESS of Property, Agreement, When may be Avoided for.—Where an aged person is very much weakened in body and mind and is under guardianship, and his wife, by holding the guardianship over him in *terrorem*, obtains an agreement which is essentially unconscionable, whereby a trustee is to be appointed for him to whom certain moneys are to be paid and lands conveyed for the use of a minor child, the money and property thus surrendered constituting the larger part of the father's estate, the transaction will be regarded as the result of duress, and set aside in equity, at the suit of his other heirs, commenced after his death. (p. 370.)

DURESS, Order of Court Approving Contract Procured by.—Where a contract is procured under circumstances which entitle the person from whom it is procured to be relieved therefrom for duress, he being already under guardianship, an order of court approving the contract can have no effect in the premises. (p. 370.)

Deacon & Good, for the appellants.

Rickel, Crocker & Tourtelott, for the appellees.

367 **WEAVER, J.** On June 24, 1896, William De Poy, a widower of advanced age, and Clara Knapp, both of Linn county, Iowa, were united in marriage. By his former marriage De Poy had become the father of several children, plaintiffs herein, and there was born to him of the second marriage, a daughter, who

is the defendant, Laura De Poy. On September 10, 1901, Clara De Poy obtained a decree of divorce from her husband, and by the same decree was awarded the custody of the child, Laura, and alimony in the sum of two thousand dollars, and attorney's fees. A little less than two months later the divorced wife began proceedings against her former husband, alleging that he had become enfeebled in body and mind, a prey to sharpers and abandoned women, and was wasting his estate, and, on these allegations, procured the appointment of a temporary guardian to take charge of the property. Immediately upon this action being taken, De Poy became very solicitous to obtain a dismissal of the proceedings against him, and visited his former wife to secure some sort of a settlement or compromise. As a result of these negotiations an agreement was finally reached whereby the district court was to appoint a trustee, whom De Poy should pay fifteen hundred dollars for the benefit of the child, Laura, and should also convey to her, or to the trustee for her use, certain town lots then owned by him. The money and property thus surrendered proved to be by far the larger part of the entire estate left to him after satisfying the judgment for alimony and paying off the existing debts and encumbrances. The agreement, which was reduced to writing and approved by the court, does not in so many words provide that upon turning over the money and property the guardianship proceedings should be dismissed; but such an understanding is clearly to be implied therefrom, and such was the course of action pursued by the parties. The proceedings were continued in force, and the guardian remained in control of the ³⁶⁸ estate, until some time in December, when De Poy, through agents, made a sale of his equity in a farm for the purpose of raising the money with which to pay the fifteen hundred dollars. The money was then by the purchaser of the land deposited with the clerk of the district court, "to be used for the purpose of releasing the temporary guardianship of William De Poy." The payment being made, the guardian was discharged and De Poy was restored to the remnant of his estate. Soon thereafter the older children of De Poy, or some of them, instituted new proceedings for the appointment of a guardian over him, and in April, 1902, death kindly intervened in the old man's behalf. This action was then begun to set aside the trust arrangement made by the deceased, as hereinbefore stated, on the ground that at the date thereof he was mentally incompetent to make a contract, and that the trust agreement was ob-

tained by fraud and duress. The district court found for the defendants, and dismissed the petition, and plaintiffs appeal.

No one, we think, can read the record in this case, and not be strongly impressed with the conviction that William De Poy at the time of this transaction was at least very much weakened in body and mind. Whether his imbecility had so far progressed as to wholly incapacitate him from making a valid contract, if left to act freely and without undue influence of any kind, is not perhaps so clear, and we think it not necessary to decide. It is very clear that he was sufficiently weak to be the easy mark of imposition, and that his former wife, by taking advantage of that weakness, and by holding the guardianship over him in terrorem, obtained an agreement which was essentially unconscionable. In the divorce proceeding, then but just ended, she had been awarded alimony, fixed, as we must presume, in due proportion to the husband's financial condition, and with reference to the fact that she was to have the custody of the child. To pay that alimony, De Poy added another to the numerous encumbrances on his property. ³⁶⁹ While the divorce did not cancel his obligations as a parent, there was no present occasion justifying a demand upon him for further immediate contribution to the child's support, and certainly the law recognizes no right in the child or in the divorced wife to compel him to set aside the greater part, or, indeed, any part, of his estate to provide against such child's future needs. It was to be presumed that if, during his lifetime, his young daughter should present any just claim upon him for her maintenance or education, he would respond thereto in proportion to his ability and her needs; and until he refused so to do, neither she, nor anyone for her, had any right of action against him.

In his weakened condition, De Poy was naturally much agitated over the guardianship proceedings. In his anxiety, he appears to have been ready to consent to almost any sacrifice to effect that purpose, and his former wife seems to have been willing to reap all the advantage to be derived from the situation. Of the fact that the old man's surrender of the bulk of his estate to the trustee was the price of his liberation from guardianship, there can be no doubt. Such, as we have already said, is the plain implication, though not the express terms, of the written agreement. Even in the absence of the writing, the admission of the former wife and of the counsel who assisted in the so-called settlement that it was the agreement or under-

standing that the guardianship proceedings should be dropped upon payment of the money, and the further fact that, as soon as De Poy had complied with the demand, he was promptly released, would force us to the same conclusion. Indeed, the whole story of the transactions from the inception of the proceedings until the discharge of the guardian is full of circumstances all tending to show that, while De Poy was quite evidently a fit subject for guardianship, the purpose of his former wife in instituting the proceedings was not to save the property for his use and support in his old age, but to obtain the largest possible portion ³⁷⁰ of his remaining estate for the benefit of her daughter, and when that purpose was accomplished her interest in the proceeding ceased.

It is suggested that, even if it be found that De Poy was to some extent of weakened mind and impaired judgment, he had the assistance of counsel, and we must assume that his interests were properly protected. We are not able to say from the record just what benefit or protection he had in this respect. Mr. J. H. Crosby testified that he is a practicing lawyer, and was consulted by De Poy. As a witness, he relates the interviews had with his client, and tells us that he himself arranged with opposing counsel, subject to the approval of De Poy and the court, for the payment of fifteen hundred dollars, and that, upon such payment being made, the matter was to be dropped. It is Mr. Crosby's opinion that his client had sufficient "mental grasp to understand ordinary business," but, if such were the case, and he was not properly the subject of guardianship, it is not easy to understand why counsel should have thought it necessary to advise the payment of fifteen hundred dollars to secure the withdrawal of a proceeding which would have been quickly dismissed by the court upon a showing of his client's mental competency. On the other hand, if the client was mentally incompetent, it is equally certain that no court would have entered any order depriving him of the property in the manner provided for in this contract. Indeed, the testimony upon this feature of the case only adds weight to our conviction that counsel was mistaken in his estimate of the mental condition of his client, and that the contract was entered into under circumstances which demand its avoidance.

It is true that the claim of duress, in the original and technical sense of physical restraint, or actual or apprehended personal violence, is not proven. But there is a modified form of the doctrine of duress, recognized quite generally by the courts

of this country, which operates to render void a contract exacted by a threatened illegal destruction or ³⁷¹ loss or withholding of property. Mr. Cooley, in his work on Torts, page 506, states the modern definition as follows: "Duress is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. Duress is either of the person or of the goods of the party. . . . Duress of the goods consists in seizing by force, or withholding from the party entitled to it, the possession of personal property, and extorting something as a condition of release, or in demanding and taking property under color of legal authority, which in fact is either void, or for some other reason does not justify the demand." It has been said, in an opinion applying this principle, that "artifice and force differ only as modes of obtaining the assent of a contracting party, and a contract to which one assents through imposition or overpowering intimidation will be declared void on appeal to either a court of law or equity to enforce it. The question whether one executes a contract or deed with a mind and will sufficiently free to make the act binding is often difficult to determine, but for that purpose a court of equity, unrestrained by the more technical rules which govern courts of law in that respect, will consider all the circumstances from which rational inferences may be drawn, and will refuse its aid against one who, although apparently acting voluntarily, yet in fact appears to have executed a contract with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will": *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597.

It has also been held that duress of property is a good plea to an action on a bond given under hard and pressing circumstances to secure the release of property seized in attachment proceedings oppressively instituted or conducted: *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643; *Chandler v. Sangler*, 114 Mass. 364, 19 Am. Rep. 367; *Spairds v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511. See, also, *Carson v. ³⁷² Patterson*, 33 Cal. 334; *Oliphant v. Markham*, 79 Tex. 543, 23 Am. St. Rep. 363, 15 S. W. 569; *Riggs v. Wilson*, 30 S. C. 172, 8 S. E. 848; *White v. Heylman*, 34 Pa. St. 142; *Crawford v. Cato*, 22 Ga. 594; *Vyne v. Glenn*, 41 Mich. 112, 1 N. W. 997; 2 *Greenleaf on Evidence*, sec. 121; *Adams v. Schiffla*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; *Lafayette etc. R. R. Co. v. Pattison*, 41 Ind. 312; *Radich v.*

Hutchins, 95 U. S. 210, 24 L. ed. 409; Cleaveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. Rep. 100, 33 L. ed. 384; Chamberlin v. Reed, 13 Me. 357, 29 Am. Dec. 506; Joannin v. Ogilvie, 49 Minn. 564, 32 Am. St. Rep. 581, 52 N. W. 217, 16 L. R. A. 376.

The rule to be deduced from these cases is especially applicable where the party on whom the imposition is alleged to have been practiced is, by reason of mental or physical infirmity, more easily influenced to act to his own injury: Walbridge v. Arnold, 21 Conn. 424; Blair v. Coffman, 2 Overt. 176, 5 Am. Dec. 659. In this respect the principle is closely related to that which is so frequently applied in avoiding contracts procured by undue influence. Indeed, undue influence may well be defined as moral duress or coercion. That William De Poy acted under such coercion, and was thereby led to make a contract which he would not have made if left to act of his own free will, there can be no reasonable doubt. By the proceedings against him he had been deprived of the right to possess and control his own property—a deprivation which it was threatened to make permanent. He was exceedingly desirous to avoid this result, and to be restored to the control of at least some portion of his estate, and, in his weakness, yielded to the plan of his release upon the terms tendered by the persons holding him at such disadvantage.

The order of the court approving the contract can have no effect in the premises. The court had no jurisdiction to order any disposition of the ward's property. No proceedings for such purpose were pending. If the contract was ³⁷³ valid, it did give the court jurisdiction to appoint a trustee to receive the property, but the legal validity of that contract was in no manner considered or adjudicated. That question was first presented in the case now before us, and finding, as we do, that it was obtained under circumstances amounting to moral compulsion—the overpowering of a will which had been materially weakened by mental decay—we think it should be set aside and held for naught, and that the trustee in possession of the property should be held to account for and surrender the same to the administrator of the estate of William De Poy.

In reaching this conclusion, we may say it is very probable that no person active in securing the contract was moved by any malicious or wanton purpose to harass or despoil this feeble and broken old man. It may, indeed, be assumed that the divorced wife believed he was liable to waste or dispose of the remnant

of his property, and that her motive in instituting the proceedings and obtaining the contract was not to enrich herself, but to obtain the best possible provision for her child. The motive was laudable enough, but the means by which that end was accomplished cannot be upheld. William De Poy was either mentally competent or incompetent. If competent, and the proceedings against him were begun to compel him to give up a part of his property, it was a flagrant abuse of the machinery of the law for the purpose of securing an unconscionable advantage. If he was incompetent, then a contract obtained from him, to his disadvantage, while he was actually under guardianship, by the very person who instituted the proceedings upon her solemn declaration that he was mentally unfit to transact business, can be viewed with no favor in a court of equity.

For the reasons stated, there must be a reversal, and the cause is remanded to the district court for the entry of a decree in harmony with this opinion.

The Legal Obligation of a Parent to support and maintain his minor children is not clear. Some authorities maintain that there is no such obligation; others take a different view of the question: See *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933, and cases cited in the cross-reference note thereto.

What Amounts to Duress, including duress of goods and of lands, is discussed in the monographic note to *New Orleans etc. Co. v. Louisiana etc. Co.*, 94 Am. St. Rep. 411-430.

NOCKS v. TOWN OF WHITING.

[126 Iowa, 405, 102 N. W. 109.]

MUNICIPAL CORPORATIONS—Liability and Duty Respecting Public Streets.—All cities and towns in Iowa are required to keep the streets and public places within their limits and which are open for public use free from dangerous obstructions and pitfalls and in reasonable repair, and the requirement is broad enough to cover not only the purposes of public travel, but any use to which a street may be subjected not in its nature violative of any established rule of law. (p. 372.)

MUNICIPAL CORPORATIONS—Public Streets, Liability for Animals Injured upon.—If a horse escaping momentarily from the control of its owner and running over public streets steps into a hole in the surface thereof, resulting in injury to the animal, such owner may recover of the municipality the damages, if it was negligent in permitting such street to be out of repair. (p. 373.)

C. E. Underhill and A. M. Bowen, for the appellant.

H. A. Evans and S. D. Crary, for the appellee.

405 BISHOP, J. The facts shown by the record, and taken most favorably to plaintiff, as we are authorized to do, make it appear that on the day in question a young horse owned by plaintiff, and kept usually in his stable abutting upon a public alley in the defendant town managed to slip its halter and escape from the barn into the alley and from thence into the street; that it ran up the street being one of the main public streets in the town, and in doing so it stepped into a hole in the surface thereof, resulting in the accident **406** and injury complained of. The street was eighty feet in width, and, as testified to by some of the witnesses, the hole was eight or ten feet distant from the center of the street; that it was from six to eight inches in diameter, and from eighteen to twenty-four inches in depth; that it had been made there by the removal, several months before, of a post used to support a merry-go-round, which had been there operated by permission of the town authorities.

The court overruled a motion to instruct a verdict in favor of defendant, and submitted the case to the jury upon the theory that if negligence on the part of the defendant in respect of the condition and care of its street had been made to appear, and, further, that the plaintiff was not negligent in allowing his horse to escape from the barn and into the street, and that an injury occurred as alleged, the right on the part of the plaintiff to recover damages should be regarded as established. The correctness of the position thus assumed is challenged by the appellant, and this raises the only question necessary to be determined by us in disposing of the case.

That cities and towns are required to keep all streets and public places within their limits, and which are open for public use, free from dangerous obstructions and pitfalls, and in a condition of reasonable repair, is the unquestioned rule of law in this state. And the requirement is broad enough to cover not only the purposes of public travel, but any use to which the street may be subjected not in itself violative of an established rule of law, and hence improper and illegal. In other words, the duty of the city or town does not end when it has prepared a way over which those engaged in actual travel may pass with convenience and reasonable safety. Having control of the streets and public places, and such having been thrown open to the public use, it owes the further duty to protect users lawfully enter-

ing thereon from dangerous defects which in reason should not have been allowed to exist. The principle involved is that which applies ⁴⁰⁷ to the case of an owner of private grounds who throws the same open to and invites a public use thereof. He may not create a dangerous condition therein, or knowingly continue a created danger, not obvious in its character, and escape liability for injuries resulting therefrom: *Haughey v. Hart*, 62 Iowa, 96, 49 Am. Rep. 138, 17 N. W. 189; *Young v. Harvey*, 16 Ind. 314; *Hurd v. Lacey*, 93 Ala. 427, 30 Am. St. Rep. 61, 9 South. 378.

It is to be observed that in the instant case it is not made to appear that the herd law, forbidding animals to run at large, was in force in Monona county, nor does it appear that there was any ordinance of the defendant town on the subject. We have, then, the question whether an accident and injury to a horse, not a trespasser, but which has escaped momentarily from the control of its owner and which accident occurs while the animal is running over and upon a public street comes within the operation of the rule above referred to. There being no contributory negligence on the part of the owner, and assuming that the accident was one that might have occurred irrespective of the immediate control of the animal, we see no reason why the rule should not be given application and a recovery allowed. This conclusion, as we think, is expressly authorized by the holding in the case of *Manderschid v. Dubuque*, 25 Iowa, 108. In that case it appeared that a horse while being driven, escaped from the control of its master, and ran away. While crossing a bridge it stepped into a hole negligently permitted in the floor thereof and was injured. The bridge was a part of a public street in the defendant city, and a recovery was sustained. There can be no difference in principle between a case where a horse has momentarily escaped from its driver and the case of one momentarily escaping from the barn or inclosure of its owner. Counsel for appellant seem to think that the case of *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82, 15 N. W. 267, is an authority to the contrary. We do not so regard it. In that case it appeared that a horse fastened to a post in the ⁴⁰⁸ street became frightened, broke the fastening, and ran away. At the end of the street there was a very steep declivity, and the horse went over this and was killed in the fall. It was said there could be no recovery, and this holding seems to have been put upon the ground that the declivity was an impassable one, and that "if the horse had been driven over the declivity by his owner

no recovery could be had for the damages sustained." It is not improbable that a distinction between the duty of a city to improve its streets and the duty to keep them in repair entered into the consideration of the court, but it is not so stated in the opinion. The Manderschid case is cited, and the doctrine there announced is not questioned. While the reasoning of the opinion in the Moss case is not in all respects satisfactory, we think that on the whole the construction placed upon it by counsel is not warranted.

The questions having reference to the character of the defect complained of, and of the knowledge of the town authorities thereof, and of the exercise of due care on the part of plaintiff, were all properly submitted to the jury.

We conclude that no error entered into the judgment, and it is affirmed.

The Liability of Municipal Corporations to persons injured by defects in the streets is discussed in the recent extended note to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 257-295. On the liability of municipalities for injuries suffered by horses by reason of defective streets, see *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733; *Kennedy v. Mayor*, 73 N. Y. 365, 29 Am. Rep. 169; *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82.

ESTATE OF DEANER.

[126 Iowa, 701, 102 N. W. 825.]

HUSBAND AND WIFE.—A Wife has, in Iowa, the Right to Contract with Her Husband in respect to her separate estate, and hence to receive his promissory note for moneys loaned by her to him. (p. 375.)

HUSBAND AND WIFE—Limitations of Action Between.—The general statute of limitations applies to contracts between husband and wife. Hence, she cannot maintain an action upon a promissory note executed by him to her, after the expiration of the time allowed by law for the commencement of actions on such instrument. (p. 375.)

HUSBAND AND WIFE—Trust Fund.—Where the Husband Borrows Money of His Wife and executes his promissory note in her favor therefor, such moneys cannot be regarded as retained by him as a trust fund. The relation between them is that of debtor and creditor only. (p. 376.)

Mullan & Pickett, for the appellant.

Millar & Williams, for the appellee.

702 LADD, J. The notes upon which the claim against the estate of deceased is based were executed more than ten years prior to his death, and were payable on demand. The consideration was the loan of money belonging to claimant to her husband. To this claim the bar of the statute of limitations was interposed as a defense. The claimant contends that this ought not to have been sustained, for that the wife could not have maintained an action on the notes against her husband in his lifetime, and hence that the period of the statute did not begin to run until coverture had been removed by death, and **703** further that, even if this be not so, the general statute of limitations does not apply to contracts between husband and wife. Neither of these propositions is sound. Claimant had the right to contract with her husband with respect to her separate estate, and such was the money for which the notes were given: See *Logan v. Hall*, 19 Iowa, 491; *Payne v. Wilson*, 76 Iowa, 377, 41 N. W. 45; *Hoaglin v. Henderson & Co.*, 119 Iowa, 720, 97 Am. St. Rep. 335, 94 N. W. 247, 61 L. R. A. 756; *McElhaney v. McElhaney*, 125 Iowa, 278, 101 N. W. 90. Section 3155 of the Code declares that: "Should the husband or wife obtain possession or control of the property belonging to the other before or after marriage, the owner may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried." In borrowing her money, the deceased obtained possession of her property, and the agreement contained in the notes to repay conferred a right growing out of the same, which she, under the express provisions of the statute, was entitled to enforce in an action against him at any time after the execution of the notes: *Mere-ness v. First Nat. Bank*, 112 Iowa, 11, 84 Am. St. Rep. 318, 83 N. W. 711, 51 L. R. A. 410.

No exception in behalf of married women, of actions against their husbands, is found in the statute of limitations. It provides that "actions may be brought within the times herein limited respectively, after their causes accrue, and not afterward, except when otherwise specially declared. . . . Those founded on written contracts . . . within ten years": Code, sec. 3447. As all exceptions not "otherwise specially declared" are excluded, we are not permitted to insert any, even though we might think that, owing to the relation of the husband and wife, she should be relieved from the necessity of pressing her claims against her husband in order to keep them alive. That was a matter for legislative consideration, and does not constitute a reason for

refusal by the courts to give effect to a specific statute to the contrary: *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Wyatt v. Wyatt*, 81 ⁷⁰⁴ Miss. 219, 32 South. 317; *Gray v. Gray*, 13 Neb. 453, 14 N. W. 390; *Bromwell v. Schubert*, 139 Ill. 424, 28 N. E. 1057; *Muus v. Muus*, 29 Minn. 115, 12 N. W. 343. And see, as recognizing the applicability of the statute, *Stewart v. McFarland*, 84 Iowa, 55, 50 N. W. 221; *Bonbright v. Bonbright*, 123 Iowa, 305, 98 N. W. 784; *Roberts v. Brothers*, 119 Iowa, 309, 93 N. W. 289. The cases cited from states where the common law prevails—that the wife may not sue the husband—are not in point, and those resting on statutes somewhat similar to ours do not meet our approval: See *Second Nat. Bank v. Merrill*, 81 Wis. 151, 29 Am. St. Rep. 877, 50 N. W. 505; *Barnett v. Harsbarger*, 105 Ind. 410, 5 N. E. 718. That the first of these was erroneous is conceded in the later case of *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681, though followed because of property interests involved; and the reasons given in the last would have been more pertinent if offered in support of an amendment to the statute by the legislature.

There is no ground for the suggestion that the money was retained by the husband as a trust fund. He is not shown to have agreed to hold it for her. On the contrary, he made use of it as his own, and, in the notes, promised to repay. It was merely a debt of his to his wife, and could only have been enforced as such: *Muus v. Muus*, 29 Minn. 115, 12 N. W. 343.

We conclude that the claim was barred, and was rightly rejected.

Affirmed.

Husband and Wife cannot contract with each other at the common law (*Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. St. Rep. 524), but this rule has been more or less modified by statutes: *Pinkham v. Pinkham*, 95 Me. 71, 85 Am. St. Rep. 392; *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273; monographic note to *Kantrowitz v. Prather*, 99 Am. Dec. 599.

The Statute of Limitations has been held not to run against claims between husband and wife: *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844. Thus, in *Second Nat. Bank v. Merrill*, 81 Wis. 151, 29 Am. St. Rep. 877, it is decided that the statute does not run against a wife on a note given by her husband in payment of an ante-marriage debt due from him to her. But, see *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194.

BURK v. CREAMERY PACKAGE MANUFACTURING CO.

[126 Iowa, 730, 102 N. W. 793.]

NEGLIGENCE.—The Violation of a Statute making it criminal for one person to deliver to another any poisonous liquor or substance without having the word "poison" and the true name thereof written or printed upon a label attached to or affixed upon the vial, box, or parcel containing the same, is negligence. (p. 379.)

NEGLIGENCE, Liability for, When not Relieved by Subsequent Negligence of Another.—Where the seller of a poison is guilty of negligence in not labeling it as required by statute and injury is caused to another thereby, the former is not relieved from liability by the fact that the purchaser of the poison was also guilty of negligence in leaving it, without any label, in a place where it was likely to injure others. (p. 379.)

NEGLIGENCE—Unforeseen Consequences.—It is not necessary to a defendant's liability for negligence that the consequences thereof should have been foreseen. It is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the wrong; such injuries as are likely under ordinary circumstances to ensue from the act or omission in question. The test is, Would ordinary prudence have suggested to the person charged with negligence that his act or omission would probably result in injury to some one? The particular result need not be such as that it should have been foreseen. (p. 380.)

NEGLIGENCE—Intervening Act or Agency, When does not Relieve from Liability.—Where there is an intervening agency, the intervening act of an independent, voluntary agent does not arrest causation nor relieve the person doing the first wrong from the consequences thereof, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer. (p. 380.)

NEGLIGENCE.—Where Several Proximate Causes Contribute to an Accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless, without its operation, the accident would not have happened. (p. 380.)

NEGLIGENCE, Poisonous Articles, Liability of One Selling Without Labeling.—If a person sells sulphuric acid without labeling the same as required by statute to indicate that it is a deadly poison, and such sale is made to the proprietor of a creamery, where it is customary to put buttermilk in jugs for the use of customers and employes, similar to one in which the acid is placed, and such jug is placed by the purchaser in his creamery alongside of a similar jug containing buttermilk, and a person seeing the jug and asking for buttermilk is by an employe of the creamery invited to drink, and in response to the invitation, instead of taking the jug containing the buttermilk, takes a drink from the one containing the acid, resulting in his death, the negligent act of the seller in not labeling the poison may be regarded as the proximate cause of such death, and he is liable therefor. (p. 381.)

NEGLIGENCE, Contributory, in Drinking Poison.—One who visits a creamery and drinks from a jug containing sulphuric acid in the belief that it was buttermilk, there being no label thereon, cannot be held to have been guilty of contributory negligence as a matter of law. (p. 382.)

JURY TRIAL—Instructions.—The Use of the Term “Proximate Cause” Without Otherwise Defining It in an instruction is not erroneous. (p. 382.)

JURY TRIAL —Instructions, When do not Remove the Doctrine of Proximate Cause from a Case.—An instruction to the jury that the fact that employes of a creamery knew a jug contained sulphuric acid would not relieve the defendant from a charge of negligence, provided he sold and delivered the acid without complying with the statute requiring it to be labeled as poisonous, does not remove the doctrine of proximate cause from the case. The instruction is good as far as it goes, and is unobjectionable if the question of proximate cause is fully and correctly covered by other instructions. (p. 382.)

Action to recover damages for the death of plaintiff's minor son, resulting from his drinking sulphuric acid. Verdict and judgment for the plaintiff. The defendant appealed.

J. T. Sullivan, for the appellant.

Gates & Liffing and Bois & Bois, for the appellee.

⁷³¹ **DEEMER, J.** Defendant is a corporation engaged in the manufacture and sale of creamery supplies, fixtures, etc., at the city of Waterloo. It keeps for sale and sells, sulphuric acid, which is extensively used in all creameries. On or about January 26, 1903, it sold at retail to one Riedel a one-gallon jug of sulphuric acid, but failed to label the same as required by statute or to indicate in any manner upon the package that it contained a deadly poison. Riedel owned and operated what was known as the “Crane Creek Creamery,” in a rural community in Black Hawk county, and he took the jug containing the acid to his said creamery, and placed it upon a shelf in one of the rooms thereof. It was the custom at this creamery to put buttermilk in jugs similar to the one in which the acid was placed, for the ⁷³² use of customers and employes of the creamery, who were invited and permitted to drink the milk placed therein. Harry O. Burk, plaintiff's minor son, who was then seventeen years of age, was lawfully at the creamery on the ninth day of February, 1903, and seeing the jug containing the acid asked an employe at the creamery if he could have a drink of buttermilk. The employe, not knowing that the boy had his eye on the sulphuric acid jug, but supposing that he was referring to another close at hand which did contain buttermilk, told him that he could, and invited him to drink of the milk. Burk went

to the jug containing the acid, and, supposing that it contained buttermilk, drank therefrom, and, as a result thereof, died the next day. The acid was taken about 2 o'clock in the afternoon of a bright day, and the room in which the jug was kept was well lighted. Burk's eyesight was good, and he could easily have seen a label had one been placed upon the jug. Creameries universally use sulphuric acid for the purpose of testing milk and cream for butter fat, and this the defendant company well knew. The jug containing the acid was a little larger than the buttermilk jug, but both were one-gallon white jugs, and there was nothing in general appearances to distinguish one from the other. Defendant knew that it was the custom of all creameries to provide buttermilk for people to drink, and that patrons thereof carried the same away for use at their homes.

Code, section 4976, provides, in substance, that if any person deliver to another any poisonous liquor or substance without having the word "poison" and the true name thereof, written or printed upon a label attached to or affixed upon the vial, box, or parcel containing the same, he shall be guilty of a misdemeanor. And sections 2588 and 2593 also prohibit the sale of poisons, except that the same be labeled as therein required. Violation of such statutes is universally held ⁷³³ to be negligence: *Ives v. Weldon*, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408, 54 L. R. A. 854, and cases cited.

But defendant declares that this negligence was not the proximate cause of the injury to the plaintiff's son. It was, of course, incumbent upon the plaintiff to show, not only a violation of one or the other of these sections of the code, but also that such violation was the proximate cause of the injury and death of his son. That matter was submitted to the jury under proper instructions, and it found for the plaintiff on this issue.

But it is said that Riedel, the owner of the creamery, was also guilty of negligence in placing the jug in the creamery at the place he did; that this negligence was the approximate cause of the injury to plaintiff's son, and that the defendant had no reason to apprehend or anticipate any negligence on the part of the purchaser of the acid. As said in the *Ives* case, *supra*, these statutes were made for the protection of all persons in the state, and to warn all that the substance they are handling is dangerous, and that its use requires constant care. Defendant, as we have said, knew of the custom which prevailed among creameries, knew that buttermilk is kept there for the use of patrons and that sulphuric acid is used in all creameries. It

knew, or should have known, that anyone lawfully about the creamery was likely to pick up this jug, and to use the same for any legitimate purpose. It owed a duty to anyone who might rightfully handle or use the jug in the ordinary, usual, or customary manner. This jug had to be kept about the creamery, and there was no statutory or other obligation on the part of the creamery owner to keep it under lock and key. Of course, if he knew that it was not labeled or by the use of ordinary care should have known of that fact, he would be required, on account of the dangerous character of the acid, to use due care to protect all persons who might rightfully come in contact therewith. But failure on the part of the purchaser to do this would not necessarily excuse the vendor for his violation of law.

But defendant insists that it had no reason to anticipate the wrongful or negligent acts of the manager of the creamery, and that it is for that reason not liable for the consequences thereof. While there are some loose expressions in the books to the effect that one is not liable for negligence unless the results of his acts might reasonably have been foreseen by him, the true doctrine, as we understand it, is that it is not necessary to a defendant's liability that the consequences of his negligence should have been foreseen. It is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the wrong; such injuries as are likely, under ordinary circumstances, to ensue from the act or omission in question. The test, after all, is, Would ordinary prudence have suggested to the person sought to be charged with negligence that his act or omission would probably result in injury to someone? The particular result need not be such as that it should have been foreseen: *Palmer v. Cedar Rapids etc. R. R. Co.*, 124 Iowa, 424, 100 N. W. 336; *Hazzard v. City of Council Bluffs*, 79 Iowa, 106, 44 N. W. 219; *Doyle v. Chicago etc. Ry. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *Osborne v. Van Dyke*, 113 Iowa, 557, 85 N. W. 784, 54 L. R. A. 367. In applying this doctrine to cases where there is an intervening agency, it is generally held that the intervening act of an independent voluntary agent does not arrest causation, nor relieve the person doing the first wrong from the consequences thereof if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer: *Lane v. Atlantic*, 111 Mass. 136.

Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which

the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. ⁷³⁵ These rules have full support in our cases: *Walrod v. Webster Co.*, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; *Harvey v. Clarinda*, 111 Iowa, 528, 82 N. W. 994; *Buehner v. Creamery etc. Co.*, 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; *Palmer v. Cedar Rapids etc. R. R. Co.*, 124 Iowa, 424, 100 N. W. 336; *Gould v. Schermer*, 101 Iowa, 582, 70 N. W. 697; *Liming v. Illinois Cent. R. R. Co.*, 81 Iowa, 246, 47 N. W. 66; *Schnee v. City of Dubuque*, 122 Iowa, 459, 89 N. W. 298; *Ives v. Weldon*, 114 Iowa, 476, 89 Am. St. Rep. 379, 87 N. W. 408, 54 L. R. A. 854.

Referring now to the facts: The jury was fully justified in finding that but for defendant's act or omission the accident in question would not have happened. Under the testimony the injury to plaintiff's son might well have been found to be the direct and proximate result of defendant's failure to label the jug containing the poison. Had it been labeled, the accident would not have happened, even though the managers of the creamery may have been negligent in placing it where they did. Moreover, had it been properly labeled, the jury might well have concluded that there would have been no negligence on the part of the creamery managers in placing it where they did.

The direction to plaintiff's son to drink out of a jug was not of itself negligence. The person giving the permission did not know that the boy had in mind the jug containing the acid, and there is nothing to show that this person even knew there was a jug there containing acid. It was a question for the jury, under proper instructions, to determine whether or not defendant's negligence was the proximate cause of the accident: See cases hitherto cited. The instructions given by the trial court on that subject were correct, and with the finding of the jury thereunder we are not disposed to interfere.

The defendant might reasonably have foreseen that its act or omission was likely to cause injury to some one who might rightfully handle the jug, and it is not enough for it to say that it could not reasonably have foreseen the exact mishap. None of the cases cited and relied upon by appellant announce a contrary doctrine, although in some of ⁷³⁶ them expressions are used which, in a measure at least, give color to its propositions. With reference to these, and to all other cases bearing upon the subject, it may be said that no one has as yet given a very satis-

factory definition of proximate cause. Indeed, one must of necessity look to practical distinctions on this subject, rather than to merely academic or theoretical ones, and, after all is said, each case must be decided largely on the special facts belonging to it. At most, the act of Riedel was a concurring and co-operating fault, and not in itself the producing cause of the injury.

2. Contributory negligence on the part of plaintiff's son is said to have been affirmatively shown by the testimony. We do not think so. This question, like the other, was for the jury, and with its conclusion on this subject we are content.

3. In referring to the matters which plaintiff should prove in order to be entitled to a verdict, the court used the term "proximate cause," without otherwise defining it. This is complained of. The complaint is without merit: *Theissen v. Belle Plaine*, 81 Iowa, 118, 46 N. W. 854; *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352. Were it otherwise, we should find that the matter was fully covered in subsequent instructions, notably the twelfth.

4. In another instruction the court said, in effect, that the fact that Riedel and another employé of the creamery knew the jug contained sulphuric acid would not, as respects the issues in the case, relieve the defendant from the charge of negligence, provided the defendant sold and delivered the acid without complying with the statutes. It is contended that this removed the doctrine of proximate cause from the case. This is incorrect. The instruction is good as far as it went, and the question of proximate cause was fully and correctly covered by other instructions. In other words, the negligence of the owner or manager of the creamery would not relieve defendant from the charge of negligence, provided the jury ⁷³⁷ found that defendant's negligence was the proximate cause of the accident. That instructions must be taken and construed together is fundamental, and, when that is done in this case, there is no error of which defendant may justly complain.

Another instruction with reference to Burk's conduct in drinking out of the jug, in its bearing upon the question of contributory negligence, is complained of. It left to the jury the question of Burk's conduct in this respect, in view of the statement made to him by the employé of the creamery when he asked for permission to drink, for it to determine whether or not he acted with reasonable prudence and care in drinking from the jug in the manner shown. There was no error in this. It did not,

as defendant contends, take from the jury the question of proximate cause.

The twelfth instruction, with reference to proximate cause, is also challenged. It announces the rules heretofore stated in this opinion clearly and distinctly, and we need not set it out in extenso.

The principal point in the case is the doctrine of proximate cause as applied to the facts disclosed by the record. We think there was sufficient testimony to take the case to the jury on this proposition.

There is no error in the record, and the judgment is affirmed.

The Liability of a druggist who, by mistake or negligence, sells a dangerous drug for a harmless medicine, is not confined to the purchaser, but extends to third persons who are injured thereby. And a manufacturing chemist or druggist who sells to a retail druggist a poison labeled as a harmless drug, is liable to one who takes such poison after it has been sold by the druggist for what it is labeled: See the monographic note to *Woodward v. Miller*, 100 Am. St. Rep. 197.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

SKINN v. REUTER.

[135 Mich. 57, 97 N. W. 152.]

TORTS—Intervening Act of Innocent Person.—If a wrong is naturally calculated, through the intervention of an innocent human agency, to injure third persons, the wrongdoer is responsible for such injuries. (p. 385.)

TORTS—Intervening Act of Innocent Person.—If one does a wrong imminently dangerous to human life which, through the intervention of an innocent human agency, causes injury to property, the wrongdoer is liable for such injury. (p. 386.)

TORTS—Sale of Diseased Animals.—If the owner of hogs, knowing them to be afflicted with a dangerous infectious disease, sells them to livestock dealers who, in ignorance of the condition of the animals, sell them to a third person who, without negligence, puts them with other hogs, the original vendor is liable to the last purchaser, not only for the value of the hogs purchased, but for the value of those which contract the disease and die. (p. 387.)

Black & Dolan, for the appellants.

L. B. & H. M. Gardner, for the appellees.

57 CARPENTER, J. The declaration in this case alleges that defendants unlawfully sold certain hogs to a firm of livestock dealers, knowing that said hogs were "afflicted **58** with a dangerous and infectious disease"; that they did not notify said firm of this fact; that said firm, in ignorance of the fact that said hogs were so infected, sold and delivered them to plaintiffs, who, without negligence on their part, placed them in a pen with their sound swine, which contracted the disease and died. The defendants pleaded the general issue. The case came on for trial before a jury, and, after the plaintiffs

had introduced some testimony, and offered to prove that the intervening purchasers "were without knowledge of any diseased condition of the hogs, and that there were no facts or circumstances that would have put them upon such notice," the trial court directed a verdict for the defendants upon the ground that the plaintiffs had no cause of action. The question in this case relates solely to the correctness of this ruling.

It is the contention of the defendants' counsel, and it was the view of the trial court, that there could be no recovery, because the act of a third person intervened between defendants' wrong and plaintiffs' injury. Is such intervention a sufficient defense? In considering this question it should be remembered that plaintiffs' claim is not based upon the ground of a breach of defendants' contract with the firm to whom they sold the hogs. It is based upon the theory that defendants committed a wrong in selling, as sound, hogs which they knew to be afflicted with a contagious disorder. Nor should we forget that the act of the intervening third person was in no sense wrongful; because, as already stated, plaintiffs offered to prove that the intervening purchasers "were without knowledge of any diseased condition of the hogs, and that there were no facts or circumstances that would have put them upon notice." We cannot, therefore, apply in this case the rule often stated in text-books and decisions, that one is not responsible for consequences resulting from the wrongful act of another person: *Griffin v. Jackson Light & Power Co.*, 128 Mich. 653, 92 Am. St. Rep. 496, 87 N. W. 888, 55 L. R. A. 318.

⁵⁹ But it cannot be said that there is a general rule of law which exempts one from the consequences of a wrong merely because between the wrong and its consequences there intervenes an innocent human agency. It is true that many acts are wrong simply because they violate a duty to a particular person. If, for instance, the defendants in this suit had misrepresented to the purchasers the weight or breeding of these hogs, they would have incurred a liability only to those purchasers: See *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503. In such cases the wrongdoer is not liable for damages sustained by a third person; not because there intervenes a human agency between the wrong and the damages, but because the third person was in no sense wronged, or, for another and quite as correct reason, because the damages did not result from the wrong. On the other hand, there are wrongs naturally calculated, through the intervention of an innocent human agency, to injure third per-

sons. In such cases both reason and authority hold the wrongdoer responsible for such injuries. The case of *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139, is such a case. There the defendant, which was engaged in the business of selling meats in the city of Detroit, sold plaintiff's brother a roll of spiced bacon. The purchaser took it to the plaintiff's house, where he boarded, and plaintiff's wife cooked it for breakfast. The bacon was in fact spoiled, and unfit for food, and made plaintiff sick. On the assumption that defendant knew that the meat was purchased for consumption, and was negligent in selling it, it was held that plaintiff had a cause of action: See, also, *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *The Nitroglycerin Case*, 15 Wall. 524, 21 L. ed. 206; *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199.

In *Filer v. Smith*, 96 Mich. 355, 35 Am. St. Rep. 603, 55 N. W. 1002, this court, speaking through Mr. Justice McGrath, said: ⁶⁰ "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act."

Assuming, as contended by defendants (see, also, *Thomas v. Winchester*, 6 N. Y. 410), that the principle which holds a wrongdoer liable for consequences, though human agencies intervene between the wrong and those consequences, applies only when the wrong committed is one imminently dangerous to human life, it is nevertheless applicable in this case. Defendants, in selling hogs known to be infected with a dangerous and infectious disease, committed a wrong imminently dangerous to human life (in recognition of this fact our legislature has made such sale a crime: See 2 Comp. Laws, sec. 5638); and it is settled (see *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199) that, when one commits a wrong imminently dangerous to human life, the principle under consideration extends his liability to damages to property.

Were the damages sustained by plaintiffs a legal consequence of defendants' wrong? The rule by which it is to be determined whether or not a particular consequence results from

a certain wrong is a subject of dispute. It has been held that the wrongdoer is responsible for all consequences naturally resulting from his wrong, whether he could have anticipated those consequences or not: 1 Sutherland on Damages, sec.16; Wharton on Negligence, sec. 77; Stevens v. Dudley, 56 Vt. 158. On the other hand, it is held that his responsibility is limited to such consequences as a person of average intelligence and knowledge should have anticipated: Pollock on Torts, p. 28. As the application in this case of either rule leads to the same result, it is unnecessary to determine which is correct. As a natural result of the wrong done by defendants, the persons to whom they sold ⁶¹ the hogs did, in ignorance of their condition, sell them to plaintiffs, and plaintiffs, relying upon their appearance, and without negligence, placed them where their other hogs became infected and died. The damage to plaintiffs was a consequence which defendants, as persons of average intelligence and knowledge, should have anticipated. They should have supposed either that the purchasers would themselves butcher these hogs, or that they would sell them to some person who would treat them as they appeared to be.

If we are right in the foregoing views, plaintiffs, if they establish their case as made in their declaration and opening statement, are entitled to recover from the defendants sufficient to compensate them for all the damages resulting to them from defendants' wrong. These damages include not only the value of the hogs purchased, but the value of those which contracted the contagion and died: See Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377.

It results from these views that the judgment of the court below should be reversed, and a new trial granted.

The other justices concurred.

The Principles Involved in the Principal Case will be found discussed in the monographic notes to Woodward v. Miller, 100 Am. St. Rep. 192-203; Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 622-625.

CULY v. UPHAM.

[135 Mich. 131, 97 N. W. 405.]

DEED FOR SUPPORT OF GRANTOR—Delivery After Death. If a deed is deposited with a third person to be delivered after the grantor's death, and recites that the grantee, as part of the consideration, shall live with and care for the grantor until his death, the grantee is not entitled to a delivery if she fails to perform the condition of living with and caring for the grantor. (p. 390.)

DEED—Delivery After Death—Statute of Frauds.—A verbal direction by a grantor that his deed, which he deposits with a third person, shall be delivered upon his death, if it amounts to a modification of the written conditions of the deed, is ineffectual under the statute of frauds. (p. 390.)

DEED—Testamentary Instrument.—If the grantor in an instrument purporting to be a deed intends that title shall remain in him until his death, and then pass to the grantee if she has performed the conditions recited therein, his intent is testamentary in character and cannot be consummated by a deed. (p. 390.)

EQUITY PRACTICE—Appeal.—Chancery Cases Should be so Tried, as a rule, that when appealed they may be finally disposed of. (p. 391.)

Searl & Monfort, for the complainants.

John M. Everden, Julius B. Kirby and C. W. Giddings, for the defendant.

¹³¹ CARPENTER, J. William Culy died August 27, 1901. On the 1st of the preceding June he executed a deed ¹³² of the land in controversy to his daughter, the defendant. This suit is brought by his other heirs at law to set aside said deed on the ground that the grantor, at the time of its execution, was mentally incompetent, that its execution was procured by undue influence, and that the deed was never delivered. When the case came on for hearing, the trial court was of the opinion that the recitals in the deed itself, together with the statements in the answer, proved that the title did not vest in the grantee during the grantor's life, and thereupon, without hearing any testimony, entered a decree for complainants.

The deed recited:

"The conditions of this deed are such that whereas I, the said grantor, am indebted to my said daughter, Hannah M. Upham, in the sum of one thousand dollars for her personal services to myself and also to my deceased wife, which amount is a part of the consideration above named. As a further con-

sideration, my said daughter, Hannah M. Upham, is to live with me at my expense, and care for me, my wife being dead, so long as I shall live; the lands above mentioned being ample, and the income therefrom, which can only be used to maintain and support myself, my said daughter, Hannah M., and my granddaughter, Minnie, so long as she shall remain unmarried, but no longer than until my death.

"As a further part consideration, my said daughter, Hannah M. Upham, shall pay to my other children, within three years after my death, as follows." (Then followed a statement giving to each of seven named persons the sum of fifty dollars.)

"It is expressly understood that my said daughter, Hannah M. Upham, shall live with me and care for me, that the expense thereof shall be derived from the use and income arising from said described lands, and also from any personal property I may have, and that she is to remain with me and care for me until my death, after which event this deed shall be delivered to her, and her title to said lands shall become absolute upon the payment of the several amounts above stated."

It appeared from defendant's answer that this deed, after execution, was deposited with John M. Everden, of ¹³³ Ithaca, Michigan, who was instructed by the grantor to deliver it to the grantee after his death; that, after the execution of the deed, the grantor informed the grantee "of what he had done, and of the contents and conditions of said deed, and stated to her that he desired to pay her for her services in caring for her mother and himself, as heretofore stated; that he did not have the money to pay her, but wished to have the matter definitely settled during his lifetime, and so had conveyed to her the said premises, on the conditions named in said deed; that he would undoubtedly require personal care and attention in his declining years, aside from the performance of household duties, and it was his desire that she should be with him and care for him so long as he might live, and give him that personal attention which he felt she alone could give; that the other conditions named in said deed were also talked over at the time, and her said father asked her if she was satisfied, if she was willing to receive her pay for the one thousand dollars in that way, and if she could and was willing to accept and perform the other conditions named in said deed; that she informed him that whatever was satisfactory to him would be to her; that he replied, 'Then we will leave it just as I have arranged it,' to which she answered, 'If you wish it that way, I am satisfied'";

and that, after the grantor's death, said Everden delivered the deed to the defendant.

It is affirmed by complainants, and denied by defendant, that no title would pass until the other children were paid the sums specified in the deed. In our view of the case, it is unnecessary to consider this question, for we think it appears clearly from the recital in said deed that the grantee, as a condition precedent to its delivery, was to live with the grantor and care for him until he died. If she failed to perform this condition, she would not, manifestly, under the terms of the deed itself, be entitled to its delivery.

The argument is made that as the grantor, after the execution of the deed, verbally directed that it should be delivered ¹³⁴ to the grantee on his death, evidence is thereby afforded of an intent to waive the performance of this condition precedent. It is a complete answer to this argument to say that this direction was merely an attempted verbal modification of the written conditions of the deed, and therefore, under the statute of frauds, entirely ineffectual.

"The purport of a deed cannot be changed by parol, and no condition or reservation contrary to its terms is valid": *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 526.

It is quite apparent that the grantor in this deed intended that title should remain in him until after he died, and that it should then pass to defendant, if she had performed the conditions. This intent was testamentary in character, and could not be consummated by a deed.

"The authorities are all agreed that no deed can be valid without delivery by the grantor. It must be made operative by this act while he is able to act. . . . It seems well settled that any deed which is to be maintained after death must have been made operative by some valid delivery by the grantor during life": *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426.

That decision, as shown by the following quotation from the opinion, governs the case at bar: "In the present case there was nothing which would have justified the submission to the jury of the question of the delivery of the deed of 1878. The note, which was to be executed after Aden Taft's [the grantor's] death, was to be executed as a condition precedent to the transfer of the title. It was not executed earlier in fact, and the deed was never delivered earlier. Had Aden delivered it to defendant, to become operative afterward on the performance of some

condition, it might have presented a very different appearance. But the delivery was meant to be, and was in fact, posthumous, and therefore void."

The cases of *Latham v. Udell*, 38 Mich. 238, *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640, *Wallace v. Harris*, 32 Mich. 380, and *Hosley v. Holmes*, 27 Mich. 135 416, in which this court upheld the validity of deeds placed in the hands of third persons, to take effect upon the grantor's death, are clearly distinguishable from the case at bar. These cases, as stated in *Thatcher v. St. Andrew's Church*, 37 Mich. 264, proceed upon the theory, forbidden by the circumstances of this case, that the delivery to the third person "gives effect to the deed."

Hitchcock v. Simpkins, 99 Mich. 198, 58 N. W. 47, relied upon by defendant, is also clearly distinguishable. In that case the deed was actually delivered to the grantee, though his right to enjoy the property was, by the terms of the deed, postponed until the death of the grantor. There was nothing whatever in the deed inconsistent with the intent that, subject to the postponement of the enjoyment, the title passed at once, and it was so held. The reasoning in that case (see page 201, 99 Mich., page 48, 58 N. W.) is in harmony with this opinion.

It results from these views that the decree of the court below should be affirmed.

We do not wish, by our silence, to seem to approve the procedure adopted in this case. If we had disagreed with the trial judge on the legal proposition discussed in this opinion, we could not have made a final disposition of the case. We should have been forced to remand the record for another hearing in the court below. As a general rule, suits at chancery should be so tried in the lower court that, when they are appealed, this court may finally dispose of the issue raised by the pleadings.

The other justices concurred.

Conveyances to Take Effect After the Grantor's Death are discussed in the monographic note to *Wilson v. Carrico*, 49 Am. St. Rep. 219-222. And deeds placed in escrow to be delivered after the grantor's death are discussed in *Lippold v. Lippold*, 112 Iowa, 134, 84 Am. St. Rep. 331, and cases cited in the cross-reference note thereto. That a conveyance must, to be effectual, transfer a present interest in the property, see *McGarrigle v. Roman Catholic Orphan Asylum*, 145 Cal. 694, 104 Am. St. Rep. 84. The distinction between a deed and a will is discussed in the monographic note to *Ferris v. Neville*, 89 Am. St. Rep. 494-500. The test by which to determine whether an instrument purporting to affect the title to land is testamentary, is to inquire whether it undertakes to vest any present interest: *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614.

TAYLOR v. SUPREME LODGE OF COLUMBIAN LEAGUE.

[135 Mich. 231, 97 N. W. 680.]

BENEFIT SOCIETY—Waiver of One Defense by Asserting Another.—The refusal of a benefit society to pay a death claim on the sole ground that the deceased never paid an assessment is a waiver of other known defenses. (p. 392.)

BENEFIT SOCIETY—Presumption of Payment of Dues.—The delivery of a benefit certificate which recites the payment of certain dues upon its delivery raises the presumption that such payment was made. (p. 393.)

Ralph L. Aldrich, for the appellant.

Andrew W. Lockton and Joel C. Hopkins, for the appellee.

231 MONTGOMERY, J. The plaintiff sued and recovered on an insurance certificate issued to her husband, John I. Taylor, in which plaintiff was named as beneficiary. The two main defenses insisted upon at the trial were: 1. **232** That John I. Taylor falsely stated in his application for insurance that he had had no illness within the preceding ten years, and had not consulted a physician; and 2. That the insured had not paid the dues for the month during which his death occurred.

As to the question arising out of the first contention, it may be stated that a waiver of this defense was clearly made out. After the death of Mr. Taylor, it appears that the defendant's officers were in correspondence with Dr. Pitcher, and were informed by him that he had treated Mr. Taylor for an acute ailment some four or five years earlier. With this information before them, they wrote plaintiff's attorney, in response to a letter demanding a settlement of the claim, declining on the distinct ground that John I. Taylor never paid an assessment. No mention of any other defense is made, the ground of refusal being distinctly stated that the deceased never became a member of the order. This constituted a waiver of other known defenses, and defendant will not, after expense of suit has been incurred, be permitted to shift ground, and assert additional grounds of defense: *Marthinson v. North British etc. Ins. Co.*, 64 Mich. 372, 31 N. W. 291; *Towle v. Iowa etc. Ins. Co.*, 91 Mich. 219, 51 N. W. 987; *Burnham v. Interstate Casualty Co.*, 117 Mich. 142, 75 N. W. 445.

The plaintiff produced a certificate containing the recital: "This certificate is issued in consideration of the membership

fee, and the warranties and agreements contained in the application for this certificate and the applicant's medical examination, and the compliance with and conformity to all the statutes of the league as they now exist, or as they may from time to time be amended, added to, or repealed, and the payment of one and forty-four one-hundredths dollars on delivery thereof, and a like payment on or before the last business day of each month thereafter."

The defendant called the treasurer of the local lodge and the treasurer of the grand lodge. The former testified that the dues had not been received by him, and the ²³³ latter that they had not been transmitted or remitted to the grand lodge; and it is contended that this testimony overcomes the presumption arising from the delivery of the policy. It appeared, however, that the soliciting agent, Blakesley, did remit the membership fee, and by his direction the policy was delivered. The one dollar and forty-four cents was payable on delivery of the policy as much as was the membership fee. Blakesley was intrusted with the delivery of the policy, and the jury might well have drawn the inference that the full payment was made to him. The jury found that the dues were paid. The presumption of payment arises from the delivery of the policy: *Petherick v. Order of Amaranth*, 114 Mich. 420, 72 N. W. 262; *Wagner v. Supreme Lodge K. of H.*, 128 Mich. 660, 87 N. W. 903; *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180.

As we find a waiver of the alleged breach of warranty, and that there was evidence to support the finding that the dues were paid, the other questions discussed are rendered immaterial.

Judgment affirmed.

Moore, Carpenter and Grant, JJ., concurred.

Hooker, C. J., took no part in the decision.

The Delivery of a Life Insurance Policy to the insured, and its possession by the beneficiary after his death are prima facie evidence of the payment of the cash consideration recited therein: *Union Life Ins. Co. v. Parker*, 66 Neb. 395, 103 Am. St. Rep. 714. See, also, *Kendrick v. Life Ins. Co.*, 124 N. C. 315, 70 Am. St. Rep. 592, and cases cited in the cross-reference note thereto.

That a Denial of Liability for a Loss under an insurance policy is a waiver of proof of loss, see *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295; *Home Ins. Co. v. Koob*, 113 Ky. 360, 101 Am. St. Rep. 354.

STANDARD WINE COMPANY v. CHIPMAN.

[135 Mich. 273, 97 N. W. 679.]

ATTACHMENT—Amendment of Sheriff's Return.—In an action against a sheriff for a failure to safely keep and deliver attached property, it is error to permit the jury to treat his return as amended so as to conform to his testimony that he did not seize the amount of property stated in the return, if no application was made to amend the return, and no showing was made in expectation that the court would pass upon its sufficiency. (p. 395.)

ATTACHMENT—Custody of Property—Duty of Sheriff.—A sheriff in custody of attached property is not liable as an insurer, but is bound to use that degree of care and prudence which a man of ordinary discretion and judgment might use with respect to his own property. (p. 395.)

Adolph Sloman, for the appellant.

Bowen, Douglas, Whiting & Marfin, for the appellee.

273 MONTGOMERY, J. The defendant, while sheriff of Wayne county, levied an attachment upon a quantity of whisky belonging to plaintiff's assignor, and made return of his doings. The attachment suit was adjusted, and the casks of whisky were turned back to plaintiff's assignor, who claims that immediately thereafter it was discovered that the casks had been tampered with, and some forty-five gallons of whisky withdrawn, and another fifty gallons diluted by substituting water in place of a portion **274** of the whisky. This action is brought to recover of defendant for failure to keep safely and deliver the attached property to the plaintiff on discontinuance of the attachment suit. The evidence adduced raised a fair question for the jury as to the care of the property exercised by the defendant while the property was in his custody. Defendant was also permitted to offer testimony tending to show that the quantity of whisky claimed was not in fact seized by him on the attachment writ, although his return showed that it was, and the circuit judge charged that the return of the sheriff was only prima facie evidence of the quantity seized, and that the return might be considered as amended to conform to the truth as the jury should find it to be. This ruling is assigned as error.

The general rule undoubtedly is that, as between the parties to an action, the return of the sheriff is conclusive: *Green v. Kindy*, 43 Mich. 279, 5 N. W. 297. So in an action against the sheriff he will not, ordinarily, be permitted to contradict his re-

turn: Crocker on Sheriffs, sec. 46. He may in a proper case, and on proper showing and notice, be permitted to amend his return in the cause in which it is made: Green v. Kindy, 43 Mich. 279, 5 N. W. 297; Cochrane v. Johnson, 95 Mich. 67, 54 N. W. 707. In the present case, so far as appears, no application was made to amend the return; certainly no showing was made in expectation that the court would pass upon its sufficiency. The plaintiff did not enter upon the trial in anticipation of an attempt to contradict the return. It was error to permit the jury to treat the return as amended.

Upon the other branch of the case, the rule established by the weight of authority is that a sheriff in custody of property is not liable as insurer, but is bound to use that degree of care and prudence which a man of ordinary discretion and judgment might use with respect to his own property: Mechem on Public Officers, secs. 760, 775; Murfree on Sheriffs, sec. 961. Plaintiff relies upon a dictum in Fletcher v. Kalkaska Circuit Judge, 81 Mich. 194, 45 N. W. 641, as authority for requiring a higher degree of care of a ²⁷⁵ sheriff than indicated above; but a reading of the case will show that the point was not involved, and that the language, taken as a whole, approving, as it does, of Moore v. Westervelt, 27 N. Y. 239, does not make for a more onerous rule.

For the error pointed out, judgment is reversed, and a new trial ordered.

Moore, Carpenter and Grant, JJ., concurred.

Hooker, C. J., took no part in the decision.

The Amendment of an Officer's Return of a levy is discussed in Jackson v. Esten, 83 Me. 162, 23 Am. St. Rep. 765; Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803, and cases cited in the cross-reference note thereto; note to Malone v. Samuel, 13 Am. Dec. 173-181.

On the Conclusiveness of an Officer's Return in attachment proceedings, see La Follett v. Mitchell, 42 Or. 465, 95 Am. St. Rep. 780; Rowe v. Hardy, 97 Va. 674, 75 Am. St. Rep. 811; Citizens' Nat. Bank v. Loomis, 100 Iowa, 266, 62 Am. St. Rep. 571; Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149.

If a Sheriff Fails to Take Care of Property which he seizes under a writ of attachment, he and his sureties are liable therefor: Smokey v. Peters-Calhoun Co., 66 Miss. 471, 14 Am. St. Rep. 571. As to the degree of care which the law exacts of him, see Jones v. McGuirk, 51 Ill. 382, 99 Am. Dec. 556.

SHREEVES v. CALDWELL

[135 Mich. 323, 97 N. W. 764.]

INFANTS—Disaffirmance by Guardian's Conveyance.—A guardian's conveyance of the land of his ward during her minority does not amount to a disaffirmance of a prior mortgage executed by her. (p. 397.)

INFANTS — Disaffirmance — Administrator's Conveyance. — Where an infant and her husband have mortgaged their homestead, a subsequent conveyance by his administrator passes no right to disaffirm the mortgage, as such right rests in the infant. (p. 397.)

INFANTS—Disaffirmance by Making Deed.—A deed executed by one after reaching his majority does not amount to a disaffirmance of a deed made by him during his infancy, unless the second deed is inconsistent with the first. (p. 397.)

INFANTS—Disaffirmance by Quitclaim Deed.—The execution of a quitclaim deed does not amount to a disaffirmance of a mortgage given by the grantor during her infancy. (p. 397.)

Louisell & Nevins, for the appellant.

Parm C. Gilbert, for the appellees.

324 MONTGOMERY, J. This is an action of ejectment. In 1898 Homer C. Shreeves was the owner of the premises in dispute, which consist of forty acres of land, worth about five hundred dollars. Shreeves and his wife, May M., occupied the land as a homestead. In April and May of 1898 Homer C. Shreeves and his wife gave two several mortgages upon the land, and defendants claim title derived by foreclosure of these mortgages. Homer C. Shreeves died in June, 1898. The plaintiff is the mother of deceased, and claims under a deed from decedent's father, and also under a guardian's deed executed by the guardian of May M. Shreeves, decedent's widow, under an administrator's deed made by the administrator of Homer C. Shreeves' estate, and finally under a quitclaim deed from May Provo, formerly May Shreeves. There was testimony tending to show that May Provo, formerly Shreeves, was a minor at the time of the execution of the mortgages in question. The circuit judge directed a verdict for the defendants, and the plaintiff brings error.

It is contended in this court that a deed executed by an infant feme covert stands upon the same footing as a deed executed by an infant feme sole, and that such deed or mortgage is voidable. This contention is not controverted, but the consequences which flow from this premise are viewed in quite different lights by the two counsel. It is manifest that a convey-

ance by the guardian of May during her minority does not amount to a disaffirmance of the mortgages, as such disaffirmance must take place after the majority is attained: 16 Am. & Eng. Ency. of Law, 2d ed., 288, 289. It is equally clear that, so long as the mortgages remained unavoids, a conveyance by the administrator of Homer C. Shreeves passed no right to disaffirm the mortgages, as this right rested in May Provo. The question presented is whether the quitclaim deed executed by May M. Provo after attaining her majority ³²⁵ amounted to a disaffirmance of the mortgages. The deed contained no mention of the mortgages, and, of course, no express disaffirmance, and can only be held to amount to a disaffirmance if the fact of giving such a deed is of itself an assertion of such an intention.

It has been held in a number of cases in this court that where one has, during minority, made a deed of land, and after reaching majority makes a deed to another, this amounts to a disaffirmance of the voidable deed: Haynes v. Bennett, 53 Mich. 15, 18 N. W. 539; Corbett v. Spencer, 63 Mich. 731, 30 N. W. 385; Prout v. Wiley, 28 Mich. 164. But to constitute such second deed a disaffirmance, it must be inconsistent with the deed executed during infancy: 16 Am. & Eng. Ency. of Law, 2d ed., 290. In McGan v. Marshall, 7 Humph. 121, it was held that a mortgage of land given by an adult did not amount to a disaffirmance of a mortgage given during infancy. In the well-considered case of Singer Mfg. Co. v. Lamb, 81 Mo. 221, the question was distinctly presented, and it was held that a quitclaim deed could not be treated as a disaffirmance of a mortgage given during infancy, on the ground that both instruments could stand together, the deed not being inconsistent with the mortgage, and being operative to convey the equity of redemption: See, also, Eagle Fire Co. v. Lent, 6 Paige 635. There was no error in the ruling of the circuit judge on this point.

It is further contended that, as no legal foreclosure of the mortgages was shown, the plaintiff was, in any view, entitled to recover. At the opening of the trial, plaintiff's counsel stated: "The only question involved, as we understand it, is the legality and validity of these mortgages. If these mortgages are valid, and there is no defect—no irregularity—in the foreclosure of these mortgages, then we are not entitled to recover."

Later in the case, when the subject of disaffirmance was under discussion, and after hearing counsel on both sides upon the proposition to direct a verdict for defendants, the ³²⁶ court said:

"This matter, in my opinion, resolves itself into a question of law entirely." Plaintiff's counsel responded, "Exactly." We think the circuit judge had the right to understand, and did understand, that the question discussed was treated and considered by both parties as controlling.

Judgment affirmed.

The other justices concurred.

The Deed of an Infant may be disaffirmed by his execution after reaching his majority, of a conveyance to another person: See *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837. But to have this effect, the instruments must be inconsistent. A quitclaim deed will not operate to disaffirm a mortgage executed by the grantor to another person during his minority: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 666, 667.

COLE v. POTTER.

[135 Mich. 326, 97 N. W. 774.]

JUSTICE'S JUDGMENT—Residence of Parties—Collateral Attack.—A justice's judgment, regular on its face, cannot be collaterally attacked by showing that the parties did not live in a township adjoining the residence of the justice. (p. 399.)

JUSTICE'S JUDGMENT—Limitation of Actions.—A justice's judgment, when docketed on a transcript in the circuit court, is a judgment of a court of record, and the ten year statute of limitations applies to an action on it. (p. 399.)

JUSTICE'S JUDGMENT—Entry of Time of Appearance.—A docket entry of a justice reading: "December 12, 1901, 10 o'clock A. M. Cause called. The plaintiff appears in person, with E., his attorney. Defendant does not appear. After waiting one hour, and defendant not appearing," etc., shows that the plaintiff appeared within the hour. (p. 399.)

JUSTICE'S JUDGMENT—False Transcript—Collateral Attack.—When a justice's judgment has been docketed on a transcript in the circuit court, it cannot be shown in a collateral proceeding that the transcript filed is not a true transcript. (pp. 399, 400.)

W. A. Leet and Julius B. Kirby, for the appellant.

John M. Everden and John T. Mathews, for the appellee.

327 MONTGOMERY, J. This is an action upon a judgment in the circuit court for the county of Gratiot, which consisted of the transcript of a judgment rendered before a justice of the peace, and regularly filed and docketed in the office of the clerk of the court. On the trial of the case a special finding of facts

was filed, by which it appears that there was filed in the clerk's office a transcript of judgment obtained before one Giles T. Brown, a justice of the peace, of two hundred and eleven dollars and fifty-two cents, on the twelfth day of December, 1891. This transcript was filed on the 13th of February, 1893. The docket entry of the judgment read as follows: "Township of Ithaca, December 12, 1891, 10 o'clock A. M. Cause called. The plaintiff appears in person, with John M. Everden, his attorney. Defendant does not appear. After waiting one hour, and defendant not appearing," etc. It was claimed, and the defendant offered testimony to show that, at a time after the entry of this judgment in justice's court, the judgment had been canceled by drawing lines across it, and by a memorandum in the margin stating that the plaintiff's attorney asked the justice to treat the whole proceedings in the case as a nullity on account of the court not having jurisdiction of the parties, in which case he deemed any judgment that might be rendered void, and by also showing that there were entered on the margin of the judgment the words, "Execution issued and delivered to J. P. King, sheriff."

It was contended that the justice had no jurisdiction to render the judgment, because the parties to the suit did not either of them live in a township adjoining the residence of the justice. The circuit judge correctly held that this question was ruled against the contention of the ³²⁸ defendant by the case of *Miller v. Smith*, 115 Mich. 427, 69 Am. St. Rep. 583, 73 N. W. 418.

It was next urged that the statute of limitations bars the action. But the judgment is the judgment of a court of record, and the ten year statute of limitation applies: *Wilcox v. Lantz*, 107 Mich. 1, 64 N. W. 735.

It is contended that the docket entry fails to show that the plaintiff appeared within the hour. This objection is frivolous. No other interpretation can be put upon this docket entry except the one that the plaintiff appeared at 10 o'clock on the 12th of December. The date employed was very clearly intended to apply to this fact of appearance.

It is next contended that the transcript filed by the justice was not a true transcript. This presents the only question about which any fair doubt may arise, and the question is, so far as we are aware, new in this court. The statute (1 Comp. Laws, sec. 847) provides that, upon docketing, such judgment shall have the same effect as a judgment rendered in the circuit court, and may in the same manner be enforced, discharged,

and canceled. The question presented is whether it may be shown that the transcript is not a true transcript in a collateral proceeding, or whether the remedy of the defendant be by motion to vacate the judgment or by a bill in equity to impeach the judgment. While we are cited to no authority upon the subject, we think on principle that the plaintiff should not be bound to come into court prepared to meet the defense sought to be interposed here, but that the remedy of defendant was by direct attack upon the judgment.

It follows that the conclusion reached by the circuit judge was correct, and the judgment in favor of the plaintiff will be affirmed.

The other justices concurred.

A Justice's Judgment, regular upon its face, cannot be impeached in a collateral proceeding by showing that neither of the parties was a resident of the county where the justice resided: *Miller v. Smith*, 115 Mich. 427, 69 Am. St. Rep. 583.

The Form of the Entry of a Judgment in the docket of a justice of the peace is regarded as immaterial, when the truth is stated so as to be intelligible: *Davis v. Trump*, 43 W. Va. 191, 64 Am. St. Rep. 849. See, too, *Bolin v. Sandlin*, 124 Ala. 578, 82 Am. St. Rep. 209.

WILLIAMS v. WIEDMAN.

[135 Mich. 444, 97 N. W. 966.]

NEGLIGENCE—Proximate Cause—Sale of Putrid Meat.—If a butcher sells a meat carcass to a retailer, and the retailer's clerk, subsequently discovering that the meat is putrid, cuts it up to dispose of it, and in so doing contracts blood poisoning through a recent cut in his hand, the negligence or wrongdoing of the vendor is not the proximate cause of the injury. (p. 401.)

Selden S. Miner and Watson & Chapman, for the appellant.

Walsh & Pardee, for the appellee.

445 HOOKER, J. Wiedman, the defendant, was a butcher, and was in the habit of furnishing meat to Barnes, a retailer. The plaintiff was in Barnes' employ, as clerk, his duty being to cut and sell meat. Wiedman sold to Barnes a beef carcass and it was put in Barnes' refrigerator on Saturday. Plaintiff saw it, and helped put it in the refrigerator. The animal had been injured by a tree falling on it, and subsequently killed. It is claimed that this fact was unknown to Barnes and to the plain-

tiff, though there is a conflict in the testimony as to Barnes' knowledge. On Wednesday plaintiff found that the meat was putrid, and removed it from the refrigerator to the back room, and an hour or two later proceeded to cut it up and dispose of it. Soon after, he was taken ill, and after his recovery he brought this action against Wiedman, claiming that in cutting up the meat he contracted blood poison through a cut upon his hand made shortly before. He recovered a verdict and judgment, and defendant has brought error.

Had the defendant made known the fact that this meat was putrid, there would have been no liability, either civil or criminal, whether Barnes, the purchaser, informed the plaintiff of the fact or not. The only ground upon which the plaintiff can claim to recover is that this knowledge was concealed from him, and it is fully met by his own testimony that he was in possession of such knowledge before attempting a disposition of the meat which led to his injury. ⁴⁴⁶ If there is any evidence that the meat was infected when sold, it is conclusively shown that the plaintiff discovered its condition to be so bad as to demand removal. He was a butcher of a year or more of experience; he had cut his finger the day before, and had the unhealed wound upon his hand. Without taking any care to protect himself, he proceeded to handle and cut up meat that he knew to be in an advanced stage of putridity, and afterward took no precautions against the consequences, and, without even washing his contaminated hands, proceeded to serve customers in the shop, which common decency and common prudence forbade. Without saying that this was contributory negligence, it is clear that defendant's negligence, deceit, concealment, or even criminality, was not the cause of this injury. Instead of being induced to cut up this meat because he had been told that it was not putrid, the plaintiff did it because he knew that it was so.

The judgment is reversed, and, as these facts are fully admitted, there is no occasion to order a new trial.

The other justices concurred.

The Doctrine of Proximate Cause is discussed in the extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. See, too, the recent case of *Cohn v. May*, 210 Pa. St. 615, 105 Am. St. Rep. 840, and cases cited in the cross-reference note thereto.

The Liability of One Who Sells an article imminently dangerous to human life, in case of injury to persons other than the immediate vendee, is discussed in *Skinn v. Reuter*, 135 Mich. 57, ante, p. 384; monographic note to *Woodward v. Miller*, 100 Am. St. Rep. 192-203.

BATES v. BOYCE'S ESTATE.

[135 Mich. 540, 98 N. W. 259.]

CORPORATIONS.—The Statute of Limitations runs against an action brought by a stockholder for the conversion of corporate property the same as it would if the action had been brought by the corporation itself. (pp. 402, 403.)

William Carpenter and E. A. Cooley, for the appellant.

Simonson, Gillett & Clark and Humphrey & Grant, for the appellee.

⁵⁴⁰ MOORE, C. J. The circuit judge directed a verdict in favor of defendant. The plaintiff has brought the case here by writ of error.

On the part of the plaintiff it is claimed that in March, 1883, the Houghton Lake Lumber Company was organized, the stockholders in which were Jonathan Boyce, holding \$80,000 of stock, Isabella J. Boyce, his wife, \$10,000 of stock, and Edward J. Boyce, their son, \$10,000 of stock. The last-named amount was given to the son by the father. It is claimed the company entered upon active ⁵⁴¹ operations the last of March under the management of the son, and continued to do business until July 31, 1883, when the father, having become angry with the son, made a bill of sale of all the property of the corporation to himself, and, it is claimed, paid to the other stockholders nothing. The son sought employment elsewhere. He died in April, 1887, leaving a widow, the plaintiff in this case, who has since married Mr. Bates. Jonathan Boyce died in 1902. The widow, according to her testimony, learned that her husband had an interest in the defunct corporation in 1894, though it is claimed she did not get definite knowledge in relation thereto until later. In 1902 the plaintiff filed a claim in probate court against the estate of Jonathan Boyce for the conversion of the \$10,000 interest of Edward J. Boyce in the lumber company in August, 1883, \$10,000, and interest thereon amounting to \$13,490.52; total, \$23,490.52. The claim was disallowed by the commissioners. An appeal was taken to the circuit court, where the circuit judge directed a verdict in favor of defendant.

A good many questions are raised by counsel. We think it necessary to discuss but one of them. If Mr. Jonathan Boyce wrongly converted the property of the corporation, it had a cause of action against him. Mrs. Bates now stands in the

place of Edward J. Boyce, a stockholder in the corporation. Had he brought the action, even though he did it in his own name, it would be one in behalf of the corporation, and the recovery would be for the benefit of the corporation and all its stockholders. The statute of limitations would have run against such an action the same as it would had the action been brought by the corporation itself: See *Wallace v. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 193, 1 N. E. 663. See, also, 1 *Morawetz on Private Corporations*, sec. 271. In the case at bar the conversion of the corporate property is claimed to have taken place in 1883. The cause of action was therefore barred in 1889 ⁵⁴² thirteen years before this claim was filed: See *Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735.

Judgment is affirmed.

Carpenter, Grant and Montgomery, JJ., concurred.

Hooker, J., took no part in the decision.

Actions by Stockholders on behalf of the corporation are discussed in the monographic note to *Johns v. McLester*, 97 Am. St. Rep. 29-52. Such actions cannot be maintained where the right of the corporation itself to sue is barred by the statute of limitations: *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625.

SULLIVAN v. DETROIT, YPSILANTI AND ANN ARBOR RAILWAY.

[135 Mich. 661, 98 N. W. 739.]

EXPRESS CONTRACT with Attorney—Whether Excludes Implied One.—It seems that an attorney may have an express contract with corporation promoters that they, in consideration of his assisting to accomplish the scheme, will make him the permanent attorney of the company, and at the same time have an implied contract with the company to pay him for the same services. (p. 409.)

CONTRACT with Attorney for Permanent Employment.—A contract with an attorney to give him permanent employment in consideration of services rendered in the formation of a corporation, is complied with by giving him employment for one year. (pp. 415, 416.)

Corliss, Andrus, Leete & Joslyn and Otto Kirchner, for the appellant.

Sullivan, Bland, Cook & Van Syckle, Elliott G. Stevenson and Leo M. Butzel, for the appellee.

661 GRANT, J. Some time in the summer or fall of 1897, three men, Messrs. Russell, Angus, and Liggett, entered into a scheme for the organization of an electric railway to run from Detroit to Ann Arbor. There already existed a street railway in Ypsilanti, another in Ann Arbor, and a third between those two cities. The scheme was to unite those three, and extend the road to Detroit. Plaintiff was an attorney at law in the city of Detroit, and had been engaged in practice for about eleven years the first three and one-half years of which he was a clerk in the law office of Honorable Don M. Dickinson, and after that engaged in practice by himself or in partnership with others. He was known to Mr. Russell, one of the promoters. It was deemed necessary to have legal advice and the services of an attorney in preparing and drawing papers. Plaintiff claims that the 662 three original promoters agreed to employ him. The agreement rested in parol, and, as stated by plaintiff, is as follows:

"Mr. John A. Russell came to me first, and told me of the enterprise they had on hand, which was to build a road between Detroit and Ann Arbor, and told me that Mr. Angus and Mr. Liggett were in with him, and wanted to know whether I could handle the law business—what kind of an arrangement they could make. They said that they would have no bonds or stock for me, but wanted to know if I would take it on consideration of being made permanent attorney. After some consideration I said that I would, provided the expenses would be paid. Then I was introduced to Mr. Angus and Mr. Liggett by Mr. Russell, and I made an arrangement with them to the same effect—that I was to go ahead and do all the legal business connected with this enterprise, help them to secure franchises, do anything on that line they called upon me to do until the enterprise would be a success, or in such condition it was sure of success. In the meantime I should be paid my expenses, and, if it was not a success, I was not to get any compensation; but, if it was a success, I was to be made permanent attorney of the road. . . . There was no different arrangement under which I performed these services."

Mr. Angus was introduced as a witness for the plaintiff, and testified that he did not recollect that there was any condition to the appointment of Mr. Sullivan. He further testified:

"Q. What compensation was he to receive if the project was successful? A. My connection with it was, would I consent to his becoming attorney for the company.

"Q. Permanent attorney, after the organization of the company? A. I do not recollect any permanent.

"Q. That he should be appointed attorney, you did not mean to terminate in a year? A. No, I had not anything special in mind as to the length of time. It did not occur to me at that time.

"Q. He was to be the regular employed attorney; that was your understanding? ⁶⁶³ A. Yes, I think that I will put it that way; I think I will say it was. . . . The substance of what was said to him, to the best of my recollection, is that I would be favorable to his appointment as attorney for the company."

Mr. Liggett was produced by the defendant, and denied any such contract as is claimed by the plaintiff, but testified that his understanding from the talk with Mr. Russell was that plaintiff was doing the work for Mr. Russell. Mr. Russell was not produced as a witness. Plaintiff had no other talk with any stockholder or officer of the company in regard to his employment or this alleged contract. Under his own testimony, the contract was made with these three promoters, and was never divulged to any other stockholder or officer of the corporation until after his employment under the resolution hereinafter referred to had terminated. In his conversation with Hawks at that time he only claimed that he had made the arrangement with Angus and Russell. Mr. Russell told Mr. Hawks that he had employed Mr. Sullivan, and that his (Sullivan's) services were a part of what he (Russell) was putting into the company—"a part of his contribution to the enterprise." Mr. Hawks received no information of any different arrangement until he received the letter of March 15, 1898, when Mr. Russell sold his stock in the company—nine hundred and eighty shares—to Mr. Hawks. In the letter offering to sell he said:

"Inasmuch as I have been active in securing the franchises and doing preliminary work for this company, which has necessitated the making of promises of various natures in return for assistance rendered, I desire, as a further consideration, that these promises made by me, which I will no longer be able to carry out, be composed along the following lines: 1. Mr. J. E. Sullivan, who did all the preliminary law work for the company gratuitously in consideration of permanent employment as attorney of the company from and after March 1st, to be guaranteed such employment for the period of one year at the rate of fifteen hundred dollars per year, payable monthly."

⁶⁶⁴ On March 15, 1898, the board of directors, six in number, passed a resolution reading as follows: "That J. Emmet Sullivan be employed as the attorney of this company for the period of one year from and after March 1, 1898, at an annual salary of fifteen hundred dollars, payable in equal monthly installments; this payment to be in full settlement of services to date and for the coming year."

At the organization of the company, November 2, 1897, four other men became stockholders of the corporation, and signed the articles of incorporation, among whom was Mr. Hawks, who afterward became president of the company. Mr. Russell became its secretary. There were at the time of the adoption of the above resolution six directors, three of whom were Hawks, Russell and Angus. Of these six directors only two—Russell and Angus—had any knowledge of the arrangement made with the plaintiff.

Mr. Sullivan was paid one hundred and twenty-five dollars per month during the year. He afterward attended to some suits, and did some other business, for which he received six hundred dollars. After the expiration of the year for which he was employed, he made claim to Mr. Hawks for fifteen thousand dollars for services rendered to the company from November 2, 1897, to March 1, 1898. The company denied liability, and thereupon plaintiff brought this suit upon the common counts in assumpsit. He rendered no bill of items to the defendant, and his bill of particulars filed in the suit recited the services in drawing the articles of association, bond and mortgage, and other papers, giving advice, attending meetings of the directors, and negotiating the purchase from the three companies, etc., for which he claimed the lump sum of fifteen thousand dollars. He recovered a verdict and judgment for nine thousand twenty-eight dollars and twelve cents.

The theory of ⁶⁶⁵ the declaration and of the right of recovery in this case is that plaintiff had no express contract with the defendant, but that he rendered services for it under such circumstances that the law implies a contract, and presumes a promise by the defendant to pay for the services so rendered, and of which it has had the benefit. Plaintiff's own evidence conclusively establishes the fact that he had no contract, either express or implied, with the defendant, until the contract of employment of March 15th, but that he made an express contract with the three original promoters of the scheme to perform the services for which he now seeks to re-

cover, upon their agreement that they should make him the permanent attorney of the company. He had no other agreement, and at no time until more than a year after the services were rendered did he make any claim to any of its officers of the contract which he now asserts was made. These promoters could make no contract for the defendant, which was not then organized. That contract could not bind the corporation until it was known to and approved by it. The knowledge of Messrs. Russell and Angus, after they became directors, was not the knowledge of the corporation. The only knowledge possessed by Mr. Hawks, its president, was that plaintiff was the personal employé of Mr. Russell. This statement did not, of course, bind the plaintiff, but shows that Hawks had no knowledge of plaintiff's alleged contract.

When, under plaintiff's version of the contract, did he begin to render services for the defendant? Certainly not until the corporation was organized. But his contract with these three promoters was that the scheme should be a success, not that the company should be organized. If the promoters had secured options for the purchase of the three companies then in existence, and franchises from the townships along the proposed line, before the organization of the company, and it had not been organized until all his services in carrying out his contract had been performed, would the corporation, with new stockholders and new directors, have been liable, either under the express ~~668~~ contract, or under an implied contract for his services performed under the special contract? The promoters evidently thought it wise to organize the company early as one of the means to assist in carrying out the scheme. But plaintiff performed services no more for the corporation in one case than in the other. He made his contract with the promoters. He knew he could not enforce it against the corporation. If he chose to make a contract which he could not enforce against the promoters, under *Durgin v. Smith*, 133 Mich. 331, 94 N. W. 1044, it is his misfortune. But whether he could enforce his contract with them is immaterial here.

The circuit judge correctly instructed the jury that plaintiff could not recover in accordance with that agreement, but instructed them that, if the plaintiff was entitled to recover at all, he was entitled to recover what his services were reasonably worth. The fatal error of the charge and of the plaintiff's theory is that he had an express contract with the promoters, which precludes any possibility of an implied contract

with the corporation. Plaintiff, a lawyer, must have known that the contract could not bind the future corporation, unless, after it was formed, it knew of its existence and ratified it.

If we understand the argument of counsel correctly, it is that the defendant never ratified the contract made with the three promoters before the organization of the company, but, having received the benefit of his services rendered under that contract, the law implies a promise on its part to pay, not in accordance with the contract, but on a separate and distinct implied contract. If defendant had ratified the contract and appointed plaintiff its attorney in accordance therewith, and that was carried out for a year, and then broken by the defendant, the only remedy of plaintiff would be an action upon the contract for the breach thereof. If, as he contends, his employment was virtually for life, or for the life of the corporation, he could not, in the event of a subsequent violation of the contract by the defendant, recover upon the basis of an implied contract the ⁶⁶⁷ value of his services previously rendered. After six years such claim would be barred by the statute of limitations. A contract will be implied only when no express contract exists. If A makes an express contract with B to perform services for C, C is not liable on an implied contract because he received the benefit. The two contracts cannot exist together, governing the same transaction.

"As in physics two solid bodies cannot occupy the same space at the same time, so in law and common sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law interposes and raises a promise": *Walker v. Brown*, 28 Ill. 378, 383, 81 Am. Dec. 287.

So, plaintiff could not have an express contract with these three promoters that they, in consideration of his services in assisting to successfully accomplish the scheme, would make him the permanent attorney of the company, and at the same time have an implied contract with the company to pay him for the same services: *Lyndon Mill Co. v. Lyndon Literary Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575; *Royston v. McCulley* (Tenn.), 59 S. W. 725, 52 L. R. A. 899; *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497; *Boughton v. Boughton's Estate*, 111 Mich. 26, 69 N. W. 94.

In *Walker v. Brown*, S., assuming to act for himself and for defendants, made a contract with plaintiffs to perform cer-

tain work. The work was done, but S. had no authority to bind defendants. Thereupon plaintiffs sought to recover from defendants upon an implied contract for the value of the work, which was beneficial to them. The court held that the express contract, executory in its provisions, totally excluded any implication of an implied one.

In *Lyndon Mill Co. v. Lyndon Literary Inst.*, 63 Vt. 581, 25 Am. St. Rep. 783, 22 Atl. 575, the defendant received the benefit of certain lumber furnished under an arrangement between some of the directors of the two companies. The contract was a personal one between the directors. Plaintiff sought to recover ⁶⁶⁸ from the defendant upon the ground that it had the benefit of the lumber furnished, and that the law implied a promise to pay. The court held that the express contract excluded any liability on the part of defendant.

In *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497, Bateman made an express contract with Thorp by which Thorp's infant daughter was to live with Bateman until she became of age. Bateman's wife died, and Thorp then took his daughter away. Bateman sued Thorp upon an implied contract. It was held that if Thorp violated the express contract, "its existence and the breach thereof cannot be the foundation for an implied assumpsit of a wholly different character."

This is not the case of *Davis v. Strobridge*, 44 Mich. 157, 6 N. W. 205, where the vendor in a parol land contract, which had become valid by part performance, repudiated it, and the vendee was allowed to recover as his damages that part of the purchase price which he had paid, and the value of the improvements put upon the land.

It is manifest from the record that the verdict was rendered upon an entirely false basis. The late Edwin F. Conely; then living, and a witness for defendant, testified to the value of such services as the plaintiff rendered. He was permitted on cross-examination by the plaintiff's counsel to state what services such as these rendered by the plaintiff would be worth upon the contingency that he was to receive nothing if the scheme did not succeed. Witness replied, "Well, I should say seven thousand five hundred dollars." This is the precise amount of the verdict, with interest added. The motion to strike this testimony out should have been granted. Plaintiff could not recover upon the contingent contract with the promoters, and therefore all evidence of this contingency was incompetent, and should have been eliminated from the consideration of the jury.

If the above views are correct, there would be no occasion to discuss any other question. But my brethren do not agree with me in holding that the plaintiff, having made an express contract, cannot, under the circumstances ⁶⁶⁹ rely upon an implied one. It therefore becomes necessary to determine another question, which I proceed now to discuss.

The other important question raised is, Assuming that plaintiff had a contract as claimed, was it performed on the part of the defendant by his employment for a year? When he entered upon his employment, and as well during the entire year, he believed that he was employed under his agreement with the three promoters; that the company had ratified that agreement, and that he was made the permanent attorney for the company. Upon this point he testified as follows:

"I received one hundred and twenty-five dollars a month, and receipted for it each month. I understood that I was to get fifteen hundred dollars a year, and did not stop to inquire whether any resolution to that effect had been passed at all. I considered that I had an agreement for permanent employment, and did not need a resolution, and did not stop to inquire. Q. Did not inquire how the fifteen hundred dollars had been fixed? A. I knew how that was fixed. Q. When did you first know that? A. The arrangement I had was to get twelve hundred dollars a year and three hundred dollars. I was sworn on the last trial, and testified that twelve hundred dollars had been mentioned, and office rent, in the first year. The three hundred dollars over twelve hundred dollars was in lieu of office rent. That is the way I took it. I was content with that. I did not get any office rent from them. Q. Don't you know as a matter of fact, the salary was fixed at fifteen hundred dollars a year because your friend, Mr. Russell, had asked that you be employed one year at fifteen hundred dollars? A. I did not state what they say on the last trial— Q. Did anybody confer with you as to fixing the salary at fifteen hundred dollars in lieu for your services and in lieu of your office rent? A. No, sir; they did not. Q. Simply began to pay at the rate of fifteen hundred dollars a year? A. Yes, sir. Q. Never questioned it? A. Never questioned it. I thought they were carrying out their agreement with me. Q. Never asked why it was done, or what resolution was passed? ⁶⁷⁰ A. I did not have to, because I had an agreement. Q. Answer the question, did you or did you not? A. I did not."

He also testified that when, at the expiration of the year, he was informed by Mr. Hawks that his services were no longer required, he told Mr. Hawks: "I said, 'My arrangement with you was that I was to be permanent attorney for the road'; and he said, 'No such thing'; and I said there was; and I said, 'I made it to Mr. Angus and Russell.'"

Mr. Russell was not called as a witness by plaintiff, though he had no connection whatever with the company. Mr. Russell placed his construction of his agreement with plaintiff in the letter written to Mr. Hawks March 15th, in which he said, in substance, in consideration of Mr. Sullivan's doing preliminary work, he had agreed to give him permanent employment as attorney of the company, and requested that he be employed for one year at a salary of fifteen hundred dollars per year. On the same day the directors met, and passed the resolution of employment, in accordance with the terms of that letter. This was the first notification to the company of the plaintiff's alleged agreement. Whether, under these facts, the resolution amounted to ratification of the agreement of Mr. Russell with plaintiff, it is probably unnecessary to determine. If the agreement was ratified, plaintiff's only remedy, as above stated, would be upon the contract for a violation thereof: *Hobbs v. Brush Electric-Light Co.*, 75 Mich. 550, 42 N. W. 965.

Upon the assumption that plaintiff had a binding contract for permanent employment, and was employed for one year at a salary of fifteen hundred dollars, which has been fully paid, counsel for defendant insist that this was a permanent employment within the true intent and meaning of the parties, and that it operated as a complete accord and satisfaction of his claim. Counsel for defendant cite in support of its contention *Louisville etc. Ry. Co. v. Offutt*, 67¹ 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181; *Perry v. Wheeler*, 75 Ky. 541; *Elderton v. Emmens*, 4 Com. B. 478; *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126; *Roddy v. McGetrick*, 49 Ala. 159.

In *Elderton v. Emmens* the contract was identical with this, except that there was no contingency of success. It was urged that the word "permanent" implied an appointment, if not for life, at least for so long a time as the society should require the services of a solicitor and the plaintiff gave no cause for dismissal. The court took a contrary view saying: "Whether the expression 'permanent attorney and solicitor' means an em-

ployment for life, or so long as the company shall exist, or what, we have no means of judging."

The court held that it meant no other than a general employment, and said that, if it had been the intention of the parties to give the word "permanent" the sense contended for by the plaintiff, the agreement would have contained a variety of stipulations that were not found in it.

In *Roddy v. McGetrick*, 49 Ala. 159, the plaintiff contracted for permanent employment as clerk for the defendant at a salary of seventy-five dollars per month. The court instructed the jury, "If the employment was not for a month, a reasonable construction would be for a year, in the absence of a construction by the parties." This instruction was sustained.

In *Perry v. Wheeler*, 75 Ky. 541, a clergyman was elected permanently to the rectorship of a church. The contract was held to be for an indefinite period, and terminable at the will of either party.

In *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126, it was "agreed by and between plaintiff and defendants that in consideration of his entering into their employment as such solicitor, and using all his efforts to secure certain named persons as customers, and to extend their business, they would give him permanent employment so long as he should use his best efforts to extend their business, paying him at the rate of twenty dollars per ⁶⁷² week, and increase his salary as the business increased." It was held that such contract was for an indefinite time, and continued only until either of the parties should wish to sever the relation. It further appears in that case that plaintiff was in the employ of another party in the same business, and that he gave up that employment under his contract with the defendants.

In *Louisville etc. Ry. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181, the railroad company employed the plaintiff, agreeing to keep him in its service so long as he did faithful and honest work. The contract was held terminable by either party at any time.

In *Texas etc. Ry. Co. v. City of Marshall*, 136 U. S. 393, 10 Sup. Ct. Rep. 846, 34 L. ed. 385, the railway company entered into an agreement with the city of Marshall by which the city donated to the construction of the road three hundred thousand dollars and sixty-six acres of land in consideration that the railway company "agreed to permanently establish its eastern terminus and Texas offices at the city of Marshall, and

to establish and construct at said city the main machine-shops and car works of said railway company." The company carried out the contract by constructing its shops and establishing its offices at Marshall as provided. At the expiration of eight years Marshall ceased to be the eastern terminus of the road, and the company removed some of its shops. It was held that the contract for permanent establishment was complied with by the establishment of the terminus and the offices and shops contracted for with no intention at the time of removing or abandoning them. It was there said: "If the city desired to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to ⁶⁷³ use the depot or the car and machine shops, and thus have made the obligation perpetual."

A permanent abode is a home, which a party may leave as interest or whim may dictate, but which he has no present intention to abandon: *Dale v. Irwin*, 78 Ill. 170.

Permanent employment means "employment for an indefinite time, which may be severed by either party": 2 *Bouvier's Law Dictionary*. Such contracts, in the absence of special considerations, conditions, and circumstances, are not construed to continue indefinitely, but are terminable at any time by either party: 20 *Am. & Eng. Ency. of Law*, 2d ed., 16.

The term "permanent employment" has, under special circumstances and conditions, been construed to mean continuous or indefinite employment, not terminable at the will of either party. Counsel for plaintiff cite and rely upon *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117, 35 L. R. A. 512; *Stearns v. Lake Shore etc. Ry. Co.*, 112 Mich. 653, 71 N. W. 148; *Harrington v. Railway Co.*, 60 Mo. App. 223; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536; *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661, 663.

In *Carnig v. Carr* the contract was that if the plaintiff, an enameler, would give up his business, and enter that of the defendant in the same occupation, he would furnish him per-

manent employment at stipulated wages. After employment for several months, defendant discharged plaintiff, though he had plenty of work of that kind for him to do. The court said: "To ascertain what the parties intended by 'permanent employment,' it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words would be commonly understood."

⁶⁷⁴ Applying this rule of construction, the court found that the contract meant employment so long as the defendant was engaged in the business of enameling, and had work which the plaintiff could do and desired to do, and so long as plaintiff was able to do the work satisfactorily. It was held not to mean life employment.

In *Stearns v. Lake Shore etc. Ry. Co.*, 112 Mich. 653, 71 N. W. 148, plaintiff was seriously injured while in the employ of the defendant, and brought suit against the defendant for damages. The defendant settled with him by paying him one hundred and seventy-five dollars, and making an agreement to employ him in the capacity of baggage-master during his entire life or his ability to do the work. The basis of liability in that case was the surrender and cancellation of a claim against the company. Such cases are *Harrington v. Railway Co.*, 60 Mo. App. 223, *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802, and *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 66 N. W. 536.

In *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661, 663, the contract which the court sustained was in writing, and provided that the defendant should employ the plaintiff as an assistant manager; said employment to continue during the time of the business of said corporation, not exceeding the term and existence of said corporation, and so long as plaintiff should own and hold in his own name fifty shares of the capital stock, fully paid up, in said corporation.

Counsel for plaintiff seek to bring this contract within the above cases cited by them, for the reason that the plaintiff agreed to render some services for which he was not to be compensated unless the enterprise was a success; in other words, that he rendered services in consideration that he was to be made permanent attorney. Plaintiff gave up no occupation or business, as did plaintiff in *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117, 35 L. R. A. 512. On the contrary, he maintained his law business the same as usual, during the same time at the same place, and in the same office.

He gave up none of his other work. He released no claim and gave no past consideration for the contract, as was done in *Stearns v. Lake Shore etc. Ry. Co.*, 112 Mich. 653, 71 N. W. 148, and similar cases. He did not agree to devote his entire time as a manager or assistant manager, ⁶⁷⁵ nor agree to hold any stock in the corporation, as did plaintiff in *McMullan v. Dickinson Co.*, 63 Minn. 405, 65 N. W. 661, 663. He had no claim for damages or otherwise to release, as did the plaintiffs in the other cases cited. Immediately after his employment, he drew the articles of association, and the defendant was duly organized. According to his own statement and theory of the contract, he then became the attorney for the defendant, with the understanding that, if the defendant secured the franchises contemplated, the company should make him its permanent attorney. This employment, under his theory, dated from the organization of the company. All the services to be rendered were services as the attorney for the company. All the services contemplated and provided for were current and future services. The life of the corporation was thirty years. Legal services would be required during the term of its existence. It follows that this contract was either a contract binding for thirty years upon the defendant, or else it was terminable at the will of either party. The contract is unusual, and it certainly should be made to clearly appear that the parties intended to make it. If that was in fact their intention, they were singularly unfortunate in the use of language necessary to bind a corporation to employ a lawyer for thirty years. It is significant that neither of the three persons with whom plaintiff alleges he made the contract supposed they were making such a one as plaintiff now claims.

If the clergyman in *Perry v. Wheeler*, 75 Ky. 541, had agreed to preach four months upon trial, with the agreement that, if his preaching were found satisfactory, the church would employ him permanently, would that have changed the construction of the contract? If plaintiff in *Roddy v. McGetrick*, 49 Ala. 159, had agreed to work as clerk for four months on trial, with an agreement for permanent employment if his work was satisfactory, would the holding have been different? If the lawyer in *Elderton v. Emmens*, 4 Com. B. 478, had agreed to do the legal work of the company for four months with the agreement that, if his legal services were ⁶⁷⁶ satisfactory, the defendant would employ him as permanent attorney and solicitor for the society, would the court have given a different construction of the word "permanent"?

I find it impossible to conclude that the parties who made this contract contemplated that the plaintiff was to be employed for thirty years, or as long as he was able to do the legal work of the defendant. I think the case falls clearly within the authorities first above cited, and that the employment under the above resolution was a full compliance with its terms.

The judgment is reversed, and, inasmuch as it is impossible for the plaintiff to make out any different case upon a new trial, I think none should be granted.

Moore, C. J., Montgomery and Hooker, JJ., concurred in the reversal of the case upon the last point stated in the opinion.

Carpenter, J., did not sit.

Contracts for Permanent Employment are discussed in *Rhodes v. Chesapeake etc. Ry. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 826, and cases cited in the cross-reference note thereto; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, and note.

RIKERD LUMBER COMPANY v. CHROUCH.

[135 Mich. 703, 98 N. W. 739.]

EXEMPTIONS—Whether Contractor can Claim.—A householder who takes work under a contract and employs others to assist him, may claim an exemption from garnishment to the extent that the amount due represents his manual labor, not exceeding thirty dollars. (p. 417.)

Richard Raudabaugh, for the appellant.

C. W. & W. S. Foster, for the appellee.

704 HOOKER, J. This case was heard below upon stipulated facts. The defendant was garnished upon a judgment, and the question before us is whether he was entitled to an exemption of thirty dollars, which the justice allowed him, but which action the circuit court reversed upon certiorari; the sum of forty-three dollars and fifteen cents having been paid into court by the garnishee.

It is agreed that defendant was a householder; that he had a contract for plastering a house at nine cents a yard, and building a chimney at twenty-five cents a foot; and that the money, to wit, forty-three dollars and fifteen cents, was due upon said

contract. Also that one Christopher, a plasterer, and a tender, assisted him in doing such work. The question in the case is whether one who takes work upon contract is entitled to the benefit of the statute, where the labor of others is covered by the contract price.

It would be a strict, if not an unreasonable, construction, to say that one should be denied the exemption provided by this statute, in a case where the work was done wholly by his own personal labor, merely for the reason that he did the work for a total sum for the job, instead of daily wages. The only difference between such a case and this one is that the defendant employed others to aid in the work, viz., a tender, without whom he could not well have done the job, and a fellow-plasterer, who might have been dispensed with, but whose employment might have been an economical measure, to keep the tender employed. The case is complicated by the fact that the sum remaining due may represent the labor of the tender and employé, and there may be a possibility that it represents nothing ⁷⁰⁶ else. But the language of the stipulation warrants the inference that forty-three dollars and fifteen cents represents either the entire contract price, or, what is perhaps more probable, that it represents the whole or a part of the earnings by the personal labor of the defendant. In either case it includes the result of his manual labor, and, to the extent that it is included, he is entitled to the exemption, not exceeding thirty dollars: See *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 244-247.

The justice found, and in his return to the writ of certiorari certifies: 1. That "the defendant was a householder"; 2. "That said garnishee money was the result of, and for, the personal work and labor of defendant"; 3. That he was entitled to an exemption of thirty dollars. If the justice erred, it was in saying that the entire sum was for his personal labor. It probably was not, according to this stipulation; but it does not appear that thirty dollars of it was not so, and, as the plaintiff in certiorari has not made it appear that there was error in saying that at least thirty dollars represented defendant's earnings, it cannot prevail. The judgment is reversed, and that of the justice affirmed, with costs of both courts.

The other justices concurred.

The Principles Involved in the Principal Case are discussed in the recent monographic note to *Tabb v. Mallette*, 102 Am. St. Rep. 92-94, where the principal case is cited.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ARNDT v. THOMAS.

[93 Minn. 1, 100 N. W. 378.]

HIGHWAYS by Adverse User.—A public highway obtained solely by adverse user for the period of time prescribed by the statute is not necessarily limited in width to the track made by passing vehicles. Its width is to be determined as a question of fact by the character and extent of the user. (pp. 419, 420.)

W. F. Hughes and T. Hughes, for the appellants.

W. L. Comstock and W. E. Clark, for the respondent.

¹ BROWN, J. This cause was before us on a former appeal, at the October, 1903, term. The opinion written at that time will be found in 90 Minn. 355, 96 N. W. 1125. The action involves a controversy respecting the location ² of a public highway as it extends over and across the property of plaintiff. On the claim that defendants, some of whom are town officials, trespassed upon plaintiff's land in attempting to improve the highway, this action was brought to recover damages, and to restrain and enjoin them from further acts of the kind. The court below found that the acts complained of were not committed within the boundaries of the alleged highway, and ordered judgment granting a permanent injunction, as prayed for in the complaint. Defendants moved for a new trial, and from an order denying it the former appeal was taken. The order was affirmed by this court, but without prejudice to the right of defendants to apply to the court below for a modification of its findings, and for an order limiting the application of the injunction to a more particularly designated and specific

location, where the acts of trespass had been committed. After the cause had been remanded, defendants moved the court below for further findings and directions in harmony with the views expressed in the opinion of this court, which motion was denied, and defendants again appealed.

There is no substantial controversy but that the highway which defendants were attempting to improve at the time complained of has been a public road for more than thirty years. It was not laid out by public authority, but became a highway by adverse user. The overwhelming preponderance of evidence establishes this fact, that it is practically conceded by plaintiff. The precise controversy involves only the portion of the road extending a distance of about forty rods over and across plaintiff's land. Defendants contend that the evidence is conclusive of the establishment of the road by adverse user between the disputed points, of the width of about two rods, while it is contended by plaintiff that because of the fact that public travel over this portion of the road was not confined to one track, or nearly so, the public acquired no easement therein for highway purposes or otherwise.

The controversy ought to be brought to an end, and the rights of the public finally settled and determined; and it was in this view that permission was granted defendants to make further application to the court below for more definite and specific findings and order of judgment. It will be difficult, no doubt, for the trial court to grant the relief authorized by the former opinion, namely, to amend its findings and order for injunction, to apply the same to a more particularly ³ designated and specific locality where the trespass was committed, without fixing and determining the boundaries of the highway. If the evidence now in the record is insufficient to justify a finding definitely defining such boundaries, further evidence may be taken upon that question.

It appears from the memorandum of the trial court that it was of opinion that a highway acquired by adverse user must be confined exclusively to one track, and it was, no doubt, influenced in a measure at least in determining the rights of the parties, by that view of the law. If such is the view of the trial court, it is at variance with some of the decisions of this court. It has always been held that a public highway obtained solely by adverse user for the period of time prescribed by statute is not necessarily limited in width to the track made by passing vehicles. Its width is to be determined as a question of fact

by the character and extent of the user: *Marchand v. Town of Maple Grove*, 48 Minn. 271, 51 N. W. 606. If the public actually used over and across the land of plaintiff at the point in question a road to the width of two rods, it became a public highway, within the meaning of the law, to the extent of the land so used, and the court should so find as a fact.

The motion addressed to the court below, as it appears in the record on this appeal, though covering ground and asking for relief beyond the scope of the former opinion, was sufficient on which the trial court could have made an order defining definitely the highway, and limiting the injunction to acts committed outside its boundaries. As suggested, if the evidence now in the record is insufficient to warrant such a finding, further evidence may be taken upon that precise question.

Order reversed and cause remanded for further proceedings in harmony with the views herein expressed.

The Principal Case is supported by *Whitesides v. Green*, 13 Utah, 341, 57 Am. St. Rep. 740, and see the monographic note thereto on highways by user.

LAIRD v. VILA.

[93 Minn. 45, 100 N. W. 658.]

WILLS—Contract to Make—Specific Performance.—An agreement by a person to devise and bequeath real and personal property to minor relatives in consideration that the beneficiaries shall assume a peculiar and domestic relation to the promisor and render him services of such character as to make it impossible to estimate their value by any pecuniary standard is valid, and if executed on the part of the promisee and beneficiaries, specific performance of the contract will be enforced. (p. 424.)

WILLS—Contract to Make—Proof.—A person may by contract obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate, but the evidence to sustain such an agreement must in all particulars be clear, positive, and convincing. (p. 425.)

WILLS—Trustee Ex Maleficio.—If a wife induces her husband to convey to her by will all of his real and personal property, upon the express promise that she in turn will convey the same property by will to designated relatives, upon default upon her part to carry out the agreement she takes the property as trustee ex maleficio for the benefit of such designated relatives. (pp. 425, 426.)

Fitzpatrick & Buck and H. M. Lamberton, for the appellants.

Brown, Abbott & Somsen, for the respondents.

⁴⁶ DOUGLAS, J. This is an action in equity brought in the district court of Winona county for specific performance of certain executed oral contracts. The defendants appeal from an order overruling their demurrer to plaintiffs' complaint.

It appears from the complaint that in 1878 and 1881, respectively, Isaac B. Cummings and Caroline F. Cummings, his wife, who were without issue, admitted their nieces Ella M. Yeaton and Annie O. Yeaton (now Annie O. Miller), minors, into their home, at Winona, and that said minors ever thereafter, until the death of the former, continued to reside therein as members of the family; that in 1885 William H. and Frederick I. Cummings, minor sons of Charles H. ⁴⁷ Cummings, and nephews of Isaac B. Cummings, were about to be removed by their father from Winona to the city of Chicago. For years they had resided with their grandmother, adjacent to the home of said Isaac B. and Caroline Cummings, and a strong attachment had sprung up between them and the latter. At that time Isaac B. and Caroline F. Cummings entered into a mutual agreement with Charles F. to adopt said minors and support and educate them during their minority, and by their respective wills devise and bequeath to said boys and said Ella M. and Annie O. Yeaton all of the property of which the said Isaac and Caroline F. Cummings should die seised or possessed, in the following proportions: Three-tenths to each boy and two-tenths to each girl—conditioned, in case of death of any of said children before the demise of said Isaac B. and Caroline F. Cummings, that the share of the one so dying should go to the remaining children in the proportion aforesaid.

It also appears that said Annie O. Yeaton had for many years lived with her uncle, Charles H. Cummings, as a member of his family, and that said Charles H., in consideration thereof, agreed perpetually to surrender to said Isaac B. and Caroline F. Cummings her care, custody, control, companionship, and service, as well as the care, companionship, control, and service of his minor sons, and consent to their adoption. Also that said Annie O. Yeaton assented thereto, and ever thereafter, with her sister, lived with Isaac B. and Caroline F. Cummings as members of their family, and each continuously rendered such service as is customary with children of natural parents. Thereupon, pursuant to an order of the district court of Winona county, and with their assent, and the consent and approval of their father, William H. and Frederick I. Cummings were duly adopted by said Isaac B. and Caroline F. Cummings. That said minors

ever thereafter, until the death of said Isaac B. and Caroline F. Cummings, sustained the relation to them of natural children, and continuously obeyed and served them as directed.

It appears that in 1886 Isaac B. Cummings by will devised and bequeathed his entire estate, both real and personal, to his wife, for her use and benefit during her natural life, and the residue of said estate, after her death, to said four minor children, in the proportions heretofore stated, but thereafter revoked said will upon the request of his ⁴⁸ said wife, and executed another, by which he bequeathed to her all his property, both real and personal. It is alleged that the former will was revoked, and the latter executed, in consideration of a mutual agreement entered into between them, by which said Caroline F. Cummings agreed that she would thereafter will all her property, both real and personal, to the said four minor children, in the proportions mentioned. Said Caroline F. Cummings—now deceased—upon the death of her husband accepted all the property of which he died seised or possessed, but failed to keep said agreement, and died intestate. By mesne conveyances the plaintiffs have become the owners of the respective shares of said beneficiaries in the property involved, other than that which they otherwise would be entitled to, had said Caroline F. Cummings devised and bequeathed said property in accordance with the alleged agreement made between herself, Isaac B., and Charles H. Cummings in 1885, and the said agreement made between herself and said Isaac B. Cummings. This action is brought for the purpose of securing a decree for the specific performance of each of said agreements, and involves the legal title to the real and personal property of which Caroline F. Cummings died seised or possessed, subject to the demands and necessities of administration in proceedings now pending in the probate court of said county. The defendants are the heirs at law of said Caroline F. Cummings.

Three objections are presented by the demurrer to each cause of action: 1. That the trial court is without jurisdiction of this action; 2. That another action is pending between the parties for the same cause; 3. That the complaint does not state a cause of action.

In holding that the first and second objections are not well taken, we need only refer to the repeated adjudications of this court in which the questions presented were decided and set at rest. In *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977, it was held that, while the probate court had jurisdiction to di-

rect an executor to enter into a conveyance of real estate which his testator had bound himself in writing to make during his lifetime, still the court was without jurisdiction to decide against a party applying for such a conveyance. In other words, the court held it was without full jurisdiction in the premises. On the other hand, it was expressly held in *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427, and reaffirmed in *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609, ⁴⁹ 95 N. W. 324, that the probate court is without, and the district court has, jurisdiction over actions for the specific performance of parol contracts for the conveyance of real and personal property.

We therefore have only to inquire as to the sufficiency of two alleged causes of action set forth in respondents' complaint. The first is based upon a agreement made between Isaac B. and Caroline F. Cummings, his wife, on the one side, and his brother Charles H. Cummings, on the other, in which the former agreed to will all property, both real and personal, of which the survivor should die seised or possessed, to the respective children and nieces of said Charles H. upon the consideration received and above referred to. In our opinion, the precise question presented has been repeatedly decided in this court, and must now be reaffirmed. In *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450, it was held, under special conditions there existing, that it was within the power of a party legally to obligate himself to make a will bequeathing certain personal property to one of his grandchildren.

In *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427, the court directed the specific performance of an executed contract in and by which the deceased agreed to devise and bequeath certain real and personal property. A number of opinions were written by different members of the court, but its conclusion was placed largely upon the ground that the services rendered in the performance of the agreement were of such a peculiar nature that it was impossible to estimate the value thereof by any pecuniary standard; that the personal relation of the parties necessarily entered into the transaction, if it be treated as valid; and that neither party thereto intended to measure such services by a pecuniary standard. In that case plaintiff and her sisters were orphans, aged eight, ten, and thirteen years, respectively; and an oral contract entered into between their uncle, with their assent, and James and Anna Mary Fosseen, in and by which the latter

agreed to devise and bequeath their property, both real and personal, to said minors, provided the latter would live with them and give them their services as directed during their minority. Said minors entered the family of the deceased, and continued during their minority to live with and bear to them the relation of children to their parents until the death of said James and Anna Fosseen.

This doctrine was again reaffirmed in *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324. In that case, in denying the application for specific performance, the ⁵⁰ court pointed out the distinction between the issue presented and that before the court in the Fosseen case, to wit, that the element of a personal and domestic relation was wanting in the contract. The court uses the following language: "A party may obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. But the courts will be strict in looking into the circumstances of such agreements, and require full and satisfactory proof of the fairness and justness of the transaction: *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450; *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427. The remedy for the breach of such a contract depends upon the facts of each particular case. If the contract be an oral one to devise land, and is reasonably certain as to its subject matter and its stipulations, equity will decree specific performance, if there has been a part performance of such a character as will take a parol agreement to convey land out of the statute of frauds, upon principles which courts of equity recognize and act upon. If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume a peculiar and domestic relation to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed: *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 78 N. W. 4, 43 L. R. A. 427; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773, notes."

In the case at bar, Charles H. Cummings surrendered the care, custody, and companionship of his children to the deceased. They were immediately adopted by the latter, and ever thereafter sustained to them, by mutual agreement, the peculiar re-

lation of children toward their natural parents. Pursuant to the same agreement, the nieces of Charles H. Cummings continued to live in the family of said Isaac and Caroline F. Cummings, and not only rendered to the latter continuous personal service, but also sustained the relation of children to them, in all particulars. It appears from the allegations of the complaint that a strong and lasting friendship grew up between said children and the deceased, and that Isaac B. executed his last will and testament in accordance with the terms of said agreement, and later, upon executing ⁵¹ an additional will in favor of his wife, exacted of her an agreement by which she undertook and agreed to execute a will during her lifetime granting to said minors the estate, both real and personal, of which she died seised or possessed. Tested by the rule adopted in the cases cited, we are of the opinion that the agreement entered into between Caroline F. and Charles H. Cummings, which it appears from the allegations of the complaint was fully executed, was valid, and is binding upon her estate, and that plaintiffs, upon the facts alleged, are entitled to the relief prayed for. We again reaffirm all that was said in the cases cited, to the effect that the proof to sustain such an agreement must in all particulars be clear, positive, and convincing. The necessity of requiring a strict degree of proof to establish an issue of this character is too patent to warrant extended elaboration.

The second cause of action is based, as we have seen, upon the allegation that Caroline F. Cummings induced her husband to modify a will then executed in favor of others, and devise and bequeath, by will subsequently executed, all his estate, both real and personal to her, and, in consideration thereof, agreed to execute a last will and testament in the terms hereinbefore set forth. It is urged that this agreement by the wife is void, under the terms of section 5534, General Statutes of 1894, which in part provides that "no contract between a husband and wife the one with the other, relative to the real estate of either or any interest therein shall be valid." Also that there is no exception to this section of the statute, as there is to the statute of frauds, in regard to partial performance, such as is provided in section 4212, General Statutes of 1894. In our opinion, however, the validity of such an agreement is not before the court. If it was, the statutory prohibition referred to would only apply to the real estate owned by the wife. As applied to real estate, the agreement between them may be treated as illegal, inasmuch as it clearly falls within the statutory prohibition; but its illegality

was not asserted by either of the parties thereto, and, having been executed by Isaac B. Cummings, and his wife having received the entire benefit thereof, by and through the will executed by her husband in pursuance of such agreement, in our judgment she took the property ex maleficio, and her heirs are estopped from disputing the validity of the agreement: *Ahrens v. Jones*, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 40 N. W. 173, 1 L. R. A. 596; *Duvale v. Duvale*, 54 N. J. 52 Eq. 581, 35 Atl. 750; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 59 N. W. 788, 25 L. R. A. 207.

The issue is distinguishable from that involved in *Luse v. Reed*, 63 Minn. 5, 65 N. W. 91. In that case the husband caused the title of real estate to be placed in his wife's name. A verbal declaration of trust made by the wife to her husband at the time of the above conveyances was held to be void, as within the statute of frauds, and the statute of use and trusts, and a written declaration of trust subsequently entered into by her, declaring that she held such property in trust for him, was held void, under section 5534, General Statutes of 1894. The court found the conveyances to her were largely for the benefit of her husband, and it was suggested that, had the transfers been for her use and benefit, a trust ex maleficio might have resulted. In the case at bar the transfer to her by will was solely in her interest and for her benefit.

It follows that the administrator of the estate of said deceased holds the property thereof, not necessary for the purpose of paying the expenses of administration, as trustee for the plaintiffs, and the latter are entitled to judgment decreeing the specific performance of the agreements referred to.

The order of the trial judge overruling the demurrer is therefore affirmed.

Specific Performance of an Agreement to devise land in return for personal services may be decreed in a proper case: *Stellmacher v. Bruder*, 89 Minn. 507, 99 Am. St. Rep. 609, and cases cited in the cross-reference note thereto; note to *Johnson v. Hubbell*, 66 Am. Dec. 787. Compare, however *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660.

Trustees Ex Maleficio are discussed in the recent monographic note to *Cassells v. Finn*, ante, pp. 91-100.

CITY OF ST. PAUL v. HAUGBRO.

[93 Minn. 59, 100 N. W. 470.]

MUNICIPAL ORDINANCE Against Smoke.—A municipal ordinance prohibiting the emission of “dense smoke” from chimneys within the corporate limits of a city is within the valid exercise of the police power, and may be enforced. (p. 428.)

Durment & Moore, Horton & Denegre and C. Bechhoefer, for the appellant.

J. C. Michael and E. W. Helmes, for the respondent.

¶ LOVELY, J. Defendant was convicted in the municipal court of St. Paul of having violated the provisions of ordinance No. 1841 of the general ordinances of the city, approved October 7, 1895, as amended by ordinance No. 1968, approved February 2, 1898, in allowing the emission of dense smoke from the building known as the “Angus Hotel,” corner Western and Selby avenues, of that city, he being the fireman employed and having charge of the furnace therein. Judgment was entered upon the conviction. Defendant appeals therefrom.

The question involved on this appeal is the validity of the so-called smoke ordinance of the city of St. Paul, which had its origin in, and was authorized by, Special Laws of 1887, page 623, chapter 48, section 3, subdivision 1, which provides that the common council of the city, among other things, may control and regulate the construction of buildings, and chimneys therein, and prohibit the emission of “dense smoke.” Section 36, article 4, of the state constitution, was amended, allowing cities to frame their own charters, in 1898. Under this amendment the legislature (Laws 1899, c. 351, p. 462) provided that all ordinances, resolutions and regulations in force at the time of any new charter adopted by virtue of such amendment, not inconsistent with the provisions thereof or of that act, should remain and be in force until altered, modified, or repealed by the law-making authorities of the city taking the benefit of its provisions, and we are clear that it cannot be open to doubt that the ordinance in question, so far as relative to the conditions presented on this appeal, was in force at the time of the defendant’s conviction.

In the case of *City of St. Paul v. Gilfillan*, 36 Minn. 298, 31 N. W. 49, it was held that at that time the city had not the power to pass such an ordinance, and, upon the absence of that author-

ity, prosecution was defeated. In *City of St. Paul v. Johnson*, 69 Minn. 184, 72 N. W. 64, the prosecution failed upon the ground that the ordinance then in force did not make the servant of the owner liable. But the objections which defeated the prosecutions on these cases do not apply here. The ordinance was in terms general, and applicable to all persons violating the same; nor can it be questioned that the legislature could confer upon a municipality the right to prohibit whatever is injurious or detrimental to public health or comfort, and that whatever deprives the residents ⁶² of urban communities of pure, uncontaminated, inoffensive air is a nuisance: *State v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076.

The pith of defendant's contention on this review is that the distinctive terms describing the act complained of in the ordinance, as well as in the complaint, whereby it is attempted to define a public nuisance, and charge that it had been committed, are so indefinite, vague, and uncertain that they fail effectively to accomplish that purpose. It is insisted that the terms of the ordinance, "dense smoke," adopted in the complaint, without more particularly describing or specifically defining the reprehended acts, are insufficient, for the reason that they do not embrace, *ex vi termini*, or by fair inference imply, essential conditions to justify the material conclusion that a matter properly the subject of police regulation and municipal control was the lawful subject of prohibition. So that the issue on this review is the exceeding simple one, viz., whether the words of the ordinance and complaint, "dense smoke," which are made by defendant's contention a determinative test of sufficiency, fairly imply and reasonably contemplate, in their meaning, the commission of acts which constitute a nuisance, and justify restrictions under penal consequences.

Unless we are entirely at fault in our apprehension of the signification of words when used in their accepted sense, the terms "dense smoke" suggest and reasonably imply much more than counsel for defendant concedes. While it may be true that at times the emission of smoke in small quantities from chimneys may not be so offensive as to itself constitute a nuisance, it is not so easy to see how dense smoke can be regarded with toleration, or found acceptable to the senses of ordinary humanity, particularly in the residence portions of a community, such as this ordinance was intended to apply to. "Smoke" is defined in Webster's International Dictionary as follows: "The visible exhalation, vapor, or substance that escapes or is expelled from a burning

body—especially from burning vegetable matter, as wood, coal, peat or the like.” “Dense” is also defined therein as follows: “Having the constituent parts massed or crowded together; close, compact; thick; containing much matter in a small space; heavy; opaque.” To be logical, and to affect, perhaps, unnecessary learning to aid common sense and common knowledge, it would follow that the exhalation of vapors from burning vegetables, wood, coal, or peat crowded together, ⁶³ containing much matter in a small space, as soot, cinders and coal dust exhaled from chimneys, would necessarily inflict upon the occupants of residences and apartment houses much discomfort, greatly add to the ordinary burdens of urban existence, and fall within the ordinarily accepted definition of a nuisance at common law.

Under a municipal ordinance prohibiting the exhalation of dense smoke in the city of Chicago, the same question was presented as here, and in disposing of the subject the court of last resort in Illinois held the following pertinent language applicable to this controversy, which we approve and adopt: “Nor will any subtle distinction be indulged as to what is meant by ‘dense smoke,’ as those terms are used in the ordinance. The terms used will be understood as commonly employed, and this court will understand by ‘dense smoke’ precisely what everybody else does that has ever seen a volume of dark, dense smoke as it comes from the smokestack or chimney where common soft or bituminous coal is used for fuel in any considerable quantities”: *Harmon v. City of Chicago*, 110 Ill. 400, 51 Am. Rep. 698.

There are well-known devices in common use for mitigating the evils caused by dense smoke, and the enforcement of the ordinance cannot be said to inflict hardships upon the consumers of the materials which occasion the nuisance complained of.

Judgment affirmed.

The Emission of Smoke, soot, and cinders in a populous city may be enjoined in a proper case: See *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51; *McMorran v. Fitzgerald*, 106 Mich. 649, 58 Am. St. Rep. 511. But see *Kaje v. Chicago etc. Ry. Co.*, 57 Minn. 422, 47 Am. St. Rep. 627. An ordinance pronouncing steamboats which emit dense smoke to be a nuisance is held constitutional in *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698. But in *St. Louis v. Heitzberg Packing etc. Co.*, 141 Mo. 375, 64 Am. St. Rep. 516, it is held that an ordinance which makes no reasonable allowance for the regulation of “dense black” or “thick gray” smoke, but essays in advance of any known device for preventing it, to punish, as for a nuisance, all who produce it to any degree whatever, is void.

GILBERT v. DULUTH GENERAL ELECTRIC COMPANY.

[93 Minn. 99, 100 N. W. 653.]

NEGLIGENCE—Electric Wires.—Evidence that electric wires carrying a high voltage were strung on the same cross-arm, sixteen inches apart, upon poles one hundred feet apart, that they had been crossed two weeks before, and again shortly after the accident, that they were permitted to sag four feet between each pole, and that the insulating material was worn off at the point of contact, is sufficient to show negligence in the stringing and maintenance of the wires. (p. 432.)

NEGLIGENCE.—Electric Companies are Bound to Use Reasonable Care in the construction and maintenance of their lines and apparatus. Such care varies with the danger which would be incurred by negligence. In cases where the wires carry dangerous currents of electricity, and the result of negligence may be exposure to death or serious accident, the reasonable care required is the highest degree of care. (p. 434.)

NEGLIGENCE—Electricity.—A person who constructs electric fixtures in his house is not bound to anticipate negligence on the part of an electric company in the construction and maintenance of its wires which connect with such fixtures. In such case he is not guilty of contributory negligence in installing a defective electric light socket in his residence. (p. 435.)

F. W. Sullivan, for the appellant.

Davis & Hollister, for the respondents.

¹⁰⁰ DOUGLAS, J. Appeal from an order of the district court denying the motion of defendant to set aside the verdict of the jury and to direct judgment in favor of defendant, as well as for a new trial.

¹⁰¹ This action was brought by the administratrix and administrator of the estate of Samuel V. Gilbert, deceased, to recover damages arising from the alleged negligence of appellant resulting in the death of said Gilbert. At 3 o'clock in the morning of April 28, 1903, the deceased, accompanied by his wife, went into his bathroom, and took hold of an electric light fixture with one hand and a water faucet with the other. A blue flame and sparks were immediately noticeable at the point of contact with the electric light fixture, and he fell backward dead. Both hands were burned, and in appearance resembled flesh seared with a hot iron. He was in perfect health at the time. An autopsy disclosed that such burns may have been caused by electricity. The blood was fluid, not coagulated; and slight hemorrhages had occurred in the lining membrane of the

stomach and also in the nostrils or bronchial tubes. It is conceded these conditions are commonly present in cases of death by electricity. Physicians called at the trial stated that they were unable, from the appearance of the deceased, to form an opinion as to the cause of death, but each testified, against defendant's objections, upon the assumption set forth in the following question, that in his judgment resulted from a shock of electricity: "Q. Now, assuming however, that on the morning before he died, or of his death, he received an electric shock by coming in contact with an electric light fixture and at the same time putting his hand upon a water fixture to complete the circuit, taking that fact together with the conditions that you found there at the autopsy, what is your opinion as to the cause of death?"

Defendant was engaged in the business of furnishing electric light to the deceased and other patrons, and to convey such electricity strung wires upon poles about one hundred feet apart in the streets of the city of Duluth. Two weeks prior to this accident two of these wires were found to be crossed, but evidence was offered tending to show they did not remain crossed, during a part of the time at least, intervening between that date and April 28th. The wind blew at the rate of fifty miles an hour on the night previous. At 7 o'clock on the morning of April 28th the same wires, one of which ran directly to the house occupied by deceased, and connected with his electric light fixtures were ¹⁰² again found to be crossed at the same place. One was a primary and the other a secondary wire. The former carried two thousand two hundred volts of electricity, and at the place of contact, which covered a distance of approximately sixteen feet, the coating which operates to insulate the wire was in one place worn off, and a blue flame was emitted from such wire at this point of contact. Five hundred voltage is sufficient to cause death. Secondary wires ordinarily carry voltage of not to exceed one hundred. On the morning of the 28th, while such wires were crossed, another party in the basement of the house occupied by the deceased received a terrific shock and was knocked down upon touching an electric fixture with his hand, which was encased in a heavy glove. The glove was badly burned. We are of the opinion the admission of this evidence, as well as the evidence tending to show that such wires were crossed at 7 o'clock on the morning of the accident was not error. While the conditions existing after an occurrence are ordinarily inadmissible as tending to show a prior

state of facts, still such conditions are often extremely material, and almost conclusive. Evidence was offered tending to show that the insulated material upon the primary wire was so badly worn as to indicate that it had been in this condition a number of days, which fact, independent of other considerations, made such evidence material, as it tended to show the wires had been crossed for considerable time before the accident.

It appears from the record that electric wires are ordinarily hung with a slack of five inches for every one hundred feet, for the purpose of allowing for changes in temperature. The weight of evidence indicates that one inch of slack in a wire will produce four inches of sag between poles one hundred feet apart. These wires were strung by appellant sixteen inches apart upon a single cross-arm. The evidence offered was conflicting, but tended to show the sag at the point of contact to be from two to four feet. There was sufficient sag so that the primary wire swung under and looped back over the secondary wire. It is conceded that the weight of the wire gradually increases the sag and requires that such wires be shortened from time to time. A rising temperature increases the length of wire, and, conversely, cold shortens it. For this reason a slack of four or five inches is necessary between posts one hundred feet apart.

¹⁰⁸ Plaintiffs based their cause of action upon three distinct acts of negligence. They were tersely stated in the charge of the court as follows: "The negligence, if any, may have been with respect to the original construction in placing the wires too close together, or it may have been in placing or allowing the wires to become too slack as suspended from the cross-arm, or it may have been only in allowing the wires to become and remain crossed, although there may have been no negligence in the other particulars. Although the construction and maintenance, including the suspension of the wires, may have been all that reasonable care could require, there may still have been negligence if the wires were permitted to become crossed, and to remain so for an unreasonable length of time, no matter what the cause."

We are of the opinion the evidence clearly sustains the verdict of the jury in finding deceased came to his death from a shock of electricity; that such electricity passed into his house from the primary wire over the secondary wire referred to; and that the questions involving the negligence of appellant either in stringing the wires dangerously close together, or in permitting them to become too slack, or in allowing them to remain crossed

for an unreasonable length of time, were fairly submitted to the jury for determination.

Evidence was offered tending to show the wires were permitted to sag approximately four feet; that they had been crossed two weeks before, and, after a high wind, were crossed on the morning deceased came to his death. Taken in connection with the fact that wires carrying a deadly current were strung but sixteen inches apart, we are of the opinion the evidence supports the verdict. The fact that a high wind was blowing the night before cannot be pleaded as an excuse, as the court will take notice that high winds are to be expected in that climate.

In our judgment, the court did not err in allowing the physicians to answer the question above set forth. Independent of knowledge that the deceased received a shock of electricity, the physicians, after a careful examination, were unable to form a definite opinion as to the cause of death. As we have seen, clear and convincing proof was offered tending to show that a deadly voltage of electricity was carried over the secondary wire into the house of the deceased. Taken in connection ¹⁰⁴ with other evidence offered, it was not error to assume the facts stated in the question, and upon this hypothesis invoke the judgment of experts.

At the request of plaintiffs the court charged: "1. If an occupation or business is attended with danger, but can be prosecuted by proper precautions, without fatal results, every reasonable effort must be made by the promoters of such business to adopt such precautions, and the greater the danger the greater the degree of care required in the pursuit of the business; and if a business is attended with great and unusual danger, every reasonable effort must be made to adopt and use all the means readily obtainable and known to science for the prevention of accidents and injury, and the neglect so to do will be regarded as proof of culpable negligence.

"2. It is due to the patrons of the defendant electric company that it shall be required to exercise a high degree of care in the construction, extension and care of its wires and poles, to the end that said patrons may not be injured by having a high and dangerous current of electricity turned into the electric light fixtures in the houses of said patrons. In all cases where the danger to be apprehended is great, care and watchfulness must be commensurate to the danger."

Elsewhere the trial court charged the jury: "In the construction, maintenance and operation of the wires in question it is

the duty of the defendant to exercise ordinary reasonable care to prevent injury to persons who might have occasion to use the current therefrom for lighting purposes. By 'ordinary and reasonable care' is meant such care as an ordinary, prudent and careful person, having in mind the dangers to be apprehended, would exercise under the same circumstances. The precautions necessary to be taken in the exercise of reasonable and ordinary care vary with the circumstances of each particular case and the degree of hazard connected therewith; greater precautions being necessary in the case of great hazard, and less in cases where there is little danger."

¹⁰⁵ However, defendant was not charged with negligence arising from the failure to adopt and use all means readily obtainable and known to science for the prevention of accidents; therefore the language used in the first request, though perhaps too broad as an abstract proposition, is not strictly appropriate to the issue, and, in our judgment, did not mislead the jury.

In *Hoye v. Chicago etc. Ry. Co.*, 46 Minn. 269, 48 N. W. 1117, the following language is used: "Reasonable care is all that is required. But this must be proportionate to the risks to be apprehended and guarded against." The rule adopted therein, as well as in the case at bar is more broadly stated in *Keasbey on Electric Wires*, section 245, as follows: "Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. This care varies with the danger which would be incurred by negligence. In cases where the wires carry strong and dangerous currents of electricity, and the result of negligence might be exposure to death or serious accident, the highest degree of care is required." Taking the charge as an entirety, we are of the opinion the court did not err. Under such circumstances reasonable care requires the exercise of a high degree of diligence: *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570; *Denver etc. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 41 Am. St. Rep. 786, 19 S. E. 344, 26 L. R. A. 810; *Alton R. R. Co. v. Foulds*, 81 Ill. App. 322; *Fitzgerald v. Edison Light Co.*, 200 Pa. St. 540, 50 Atl. 161; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464, 39 L. ed. 464. See, also, *Hoye v. Chicago etc. Ry. Co.*, 46 Minn. 269, 48 N. W. 1117.

Evidence was offered showing that the electrical appliances in the house occupied by the deceased were placed there by experts employed by him, and were defective in this: That the socket of

the electrical fixture which deceased grasped at the time of his death was not properly insulated in all its parts, and that the absence of proper insulation rendered it possible for a tremendous electrical current to pass through such fixtures upon coming in contact with his hand at a moment when with his other hand he touched a metallic ground connection. It is urged this was negligence on the part of deceased and precludes a recovery. We are of the opinion this contention cannot be sustained. House fixtures are not constructed with a view of connecting wires with death-dealing currents. It appears from the record, secondary ¹⁰⁸ wires ordinarily carry a voltage of but one hundred, or one-fifth the amount of a deadly current, and one twenty-second part of the voltage which the evidence tends to show passed over the wire in question and through the body of the deceased. The deceased was not an electrical expert, and, unlike appellant, he was not engaged in a business which charged him with special knowledge in the premises. We cannot say he was guilty of negligence in not anticipating that primary and secondary wires might become crossed in the streets, and that it was his duty to take precautions to guard against danger therefrom. Neither can we say that his failure to do so was the proximate cause of his death. On the other hand, appellant was charged with ordinary care in each of the particulars submitted to the jury, and we are of the opinion that the evidence sustains the implied finding that it did not exercise such care; and also that other errors assigned are without prejudice to the substantial rights of appellant, and do not constitute reversible error.

Order affirmed.

The Duty and Liability of Electric Corporations are discussed at length in the recent monographic note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 515-539, and in the subsequent cases of *Parsons v. Charleston etc. Elec. Co.*, 69 S. C. 305, 104 Am. St. Rep. 800; *Cumberland Tel. etc. Co. v. Martin*, 116 Ky. 554, 105 Am. St. Rep. 229.

MAAS v. BURDETZKE.

[93 Minn. 295, 101 N. W. 182.]

ADVERSE POSSESSION—Title by Prescription.—A person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the national homestead law, may acquire title thereto by adverse possession as against the true owner. (p. 438.)

H. M. Lamberton and Brown, Abbott & Somsen, for the appellants.

C. C. Willson and T. Spillane, for the respondent.

296 **START, C. J.** This is an action commenced October 21, 1901, to recover from the defendant the northeast quarter of section 35 in township 108 north, range 14 west, in the county of Olmsted. The complaint alleged that the plaintiffs were the owners of the land, and that the defendant was in the unlawful possession thereof. The answer denied the allegations of the complaint, and alleged that the defendant had been in the actual, exclusive, and adverse possession of the land for more than fifteen years next before October 1, 1893. The reply denied the alleged adverse possession of the defendant. A trial of the issues resulted in a verdict for the defendant. The plaintiffs made an alternative motion for judgment in their favor or for a new trial. The trial court made its order denying the motion for judgment, and granting a new trial on the ground that the verdict was not justified by the evidence. The plaintiffs appealed from the order.

The plaintiffs claim that they were entitled to judgment in their favor upon the undisputed evidence, as a matter of strict legal right. This claim is based upon the fact that the evidence is substantially conclusive that, when the defendant entered into possession of the land, he did so in the erroneous belief that the title thereto was in the United States and with the intention of claiming the land under the federal homestead law. In fact, the title to the land had passed out of the United States before the defendant took possession of it. The contention of the plaintiffs is that the legal conclusion follows from such facts that the statute of limitations did not run in defendant's favor, because he did not intend to hold in hostility to the United States. We have, then, this question: Can

a person who takes possession of land in the erroneous belief that it is public land, with the intention of holding and claiming it under the federal homestead law, acquire title thereto by adverse possession, as against the true owner?

²⁹⁷ Section 5134, General Statutes of 1894, provides that "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the premises in question within fifteen years before the commencement of the action."

It would seem from this language that the defendant in an action of ejectment might avail himself of the statute of limitations by showing that he had been in the open and exclusive possession of the premises, claiming them adversely to the plaintiff, for the full period of the limitation, although he entered recognizing the claim of a third party thereto, for proof of such fact would necessarily establish the fact that the plaintiff or those under whom he claimed had not been seised or possessed of the premises within fifteen years: See *Dean v. Goddard*, 55 Minn. 296, 56 N. W. 1060.

On the other hand, it would seem that if the defendant were seeking to recover the premises, as plaintiff, on the ground that he had acquired title by fifteen years' adverse possession, he would be obliged to show that he took and held possession thereof with the intention of holding them for himself, to the exclusion of all others. If there is this suggested distinction between a case where a party pleads adverse possession as a defense, and one in which he as plaintiff asserts title in himself by virtue of his sometime adverse possession of the premises for fifteen years, it would follow in this case that the defendant could in any event invoke in his defense the statute of limitations, for he entered into possession of the premises with the intention of claiming them as against everyone except the United States. This necessarily included the plaintiffs and their grantor.

We are not, however, disposed to rest our decision of this appeal on any narrow ground, but upon the answer to be given to the question we have stated. The rule as settled by the decisions of this court as to title by adverse possession is that the disseisor must enter and take possession of the premises with the intention of holding them for himself to the exclusion of all others, and such possession must be actual, open, exclusive, hostile—that is, adverse—and continuous for fifteen years:

Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Carpenter ²⁹⁸ v. Coles, 75 Minn. 9, 77 N. W. 424; Cool v. Kelly, 78 Minn. 104, 80 N. W. 861.

Counsel for the plaintiffs contends, in effect, that under this rule the possession of a disseisor can never be adverse to anyone if he enters intending to acquire the title of the United States, if it has the title, as he erroneously believes, because the United States is included in the words "to the exclusion of all others," used in stating the rule.

The rule is general in its terms, and the construction of it urged seems to be narrow and unreasonable. Statutes of limitation do not operate against the state or general government unless there be an express provision or necessary implication to that effect, and title to public land cannot be acquired by adverse possession. Now, if a person enters upon land, erroneously believing it to belong to the United States, with the intention of acquiring the title to the exclusion of all others by his entry and settlement under the homestead law, how can it be reasonably claimed that, because he did not further intend to do that which was a legal impossibility, his possession is not adverse, within the true meaning of the rule? It must be held, upon principle and authority, that the rule excludes by necessary implication the United States, and that a person may admit its title to the premises, if any it has, and hold them adversely to the exclusion of all others: 1 Cyc. 1028; Clemens v. Runckel, 34 Mo. 41, 84 Am. Dec. 69; Hayes v. Martin, 45 Cal. 559; McManus v. O'Sullivan, 48 Cal. 15; Converse v. Ringer, 6 Tex. Civ. App. 51, 24 S. W. 705; Francoeur v. Newhouse (C. C.), 43 Fed. 236; Northern Pac. R. Co. v. Kranich (C. C.), 52 Fed. 911.

The case of Altschul v. O'Neill, 35 Or. 202, 58 Pac. 95, which is cited and relied upon by the plaintiffs, is opposed to this conclusion. That case reviews the cases we have cited, and seeks to distinguish them, and to show that, upon principle and authority, there is no exception in favor of the United States, and that, to constitute adverse possession, the disseisor must intend to hold in hostility to its title, if any it has. We have attentively considered this decision, and, notwithstanding our great respect for the learned court making it, we are unable to concur in its conclusion. We accordingly answer the controlling question in this case in the affirmative, and hold that a person who takes possession of land in the erroneous belief that it is ²⁹⁹ public land, with the intention of holding and claim-

ing it under the federal homestead law, may acquire title thereto by adverse possession as against the true owner.

Order affirmed.

For Authorities supporting the principal case, see the monographic note to Schneider v. Hutchinson, 76 Am. St. Rep. 481. It is held in Clemens v. Runckel, 34 Mo. 41, 84 Am. Dec. 69, that a person's possession is adverse to the true owner where he enters and holds actual, open, uninterrupted, and notorious possession of land to which he expects to acquire title by pre-emption whenever the land should be brought into market.

NESNE v. SUNDET.

[93 Minn. 299, 101 N. W. 490.]

TRADE NAMES—Injunction Against Use of.—If in organizing a corporation a trade name is chosen for and adopted by it, similar to one adopted by another and older corporation or copartnership, the use of such name may be enjoined by the latter if misleading and calculated to injure its business, irrespective of the good faith or intent to mislead the public, in adopting such trade name. (p. 441.)

M. O'Brien, H. Steenerson and C. Loring, for the appellants.

R. J. Montague and A. Chilgren, for the respondents.

²⁰⁰ DOUGLAS, J. Appeal by plaintiffs from a judgment of the district court in favor of defendants.

In June, 1901, plaintiffs entered into a copartnership at Crookston, Minnesota, under the firm name of Crookston Marble and Granite Works, ³⁰⁰ and engaged in the general business of manufacturing and selling cemetery monuments. Two weeks later they changed their name to the Crookston Marble Works, and have since conducted business thereunder. For nine years prior thereto some of the defendants had conducted a like business at Crookston as copartners under the firm name of Northwestern Marble Works. They used the words "Marble Works" as a sign over the door of their place of business, and it appears that during part of said time approximately ten per cent of the letters received by them were addressed, "Crookston Marble Works," but that such correspondence is decreasing. In July, 1902, said defendants associated themselves together as a corporation under and pursuant to the laws of this state, adopted "Crookston Marble Works" as a corporate name, and thereafter continued in business thereunder. It therefore appears such parties are engaged in the

same business in the same territory, much of which is carried on by correspondence, and are using identical names. This has heretofore led to, and of necessity in the future will result in, endless confusion.

It is well settled, where a trade name is appropriated by another with a fraudulent intent to compete unfairly in a special line of business with parties who had theretofore adopted it and acquired a proprietary interest therein, that injunction will lie: *Merchants' Detective Assn. v. Detective Mercantile Agency*, 25 Ill. App. 250; *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1, 8 Pac. 645; *Keller v. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88, 19 N. E. 196; *Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579; *Avery v. Meikle*, 81 Ky. 92; *McLean v. Fleming*, 96 U. S. 254, 24 L. ed. 828; *Hiram Walker & Sons v. Mikolas (C. C.)*, 79 Fed. 955; *Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 788.

In *Rickard v. Caton College Co.*, 88 Minn. 242, 92 N. W. 958, this principle was adopted. In that case the Caton College Company, in its advertisement and by its advertising signs, appropriated the name of "Minnesota College of Business," which had long been used by a rival, and placed the same in large letters following the words "Caton College" in small type. It was strenuously urged that "Minnesota" was a geographical word of a descriptive character, that the word "School" was used to describe the nature of the institution, and that neither of the terms could be made the subject of a strict property right. This was conceded, but the court enjoined the use of the term ⁸⁰¹ "Minnesota School of Business," because of the manner in which the words were associated and used. It was held that the use of the name was clearly calculated to deceive the public, and trespassed upon the rights of plaintiffs. Had the college been described as a "School of Shorthand or Business," etc., "at —, Minnesota," the use of the words clearly could not have been the subject of criticism.

Plaintiffs adopted their trade name one year prior to the organization of the defendant corporation. As we have seen, the names of the parties and place and nature of the business are identical. The trial court found that such names were adopted by both parties for a lawful purpose, and without intent by either to compete unfairly with the other, or to "unfairly obtain from said postoffice the mail intended for the other," but that confusion and delay in its delivery would naturally result. We have only to inquire whether, in the face of a negative finding,

the selection by defendants of the acquired trade name of a rival must be deemed to have been made with an intent to compete unfairly, or whether such intent is immaterial.

The rule is settled that, in the absence of statutory provisions regulating the subject, parties organizing a corporation must choose a name at their peril, and that the use of a name similar to one adopted by another corporation may be enjoined at the instance of the latter, if misleading and calculated to injure its business: *Newby v. Oregon C. Ry. Co.*, Deady, 609, Fed. Cas. No. 10,144; *Holmes v. Holmes*, 37 Conn. 278, 9 Am. Rep. 324; *Farmers' Loan & Trust Co. v. Farmers' etc. Co.*, 21 Abb. N. C. 104, 1 N. Y. Supp. 44; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 27 L. R. A. 742, 39 N. E. 490; *Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.)*, 32 Fed. 94; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576; *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313. As was stated in *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786, 42 Atl. 308, 43 L. R. A. 95. "The principle upon which these cases rest is that, although a corporation may be legally created, it can no more use its corporate name in violation of the rights of others than an individual can use his name, legally acquired, so as to mislead the public and to injure another."

Some confusion has arisen in the discussion of trademark and trade name cases, but the principles applicable to each are in some, though not in all, particulars analogous. In the *Armington* case it was held injunction would lie to prevent the use of a similar name, ³⁰² even in the absence of proof of actual damage or of a fraudulent intent.

In *North Cheshire and Manchester Brewery Co., Ltd., v. Manchester Brewery Co., Ltd.*, [1899] App. Cas. 83, it appeared the North Cheshire Brewery Company, Limited, without intent to deceive, reorganized as the North Cheshire and Manchester Brewery Company, Limited. The court, at the instance of the Manchester Brewery Company, a then existing corporation, enjoined the use of such name.

In *American Clay Mfg. Co. v. American Clay Mfg. Co. of New Jersey*, 198 Pa. St. 189, 47 Atl. 936, the defendant was enjoined from using its name. It was held that the motives of the parties attempting its wrongful appropriation were immaterial.

In *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, 39 N. E. 490, 27 L. R. A. 742, the court,

in holding that an exclusive right may be acquired in the name in which a business may be carried on, whether that of a partnership or an individual, say: "But if the name was assumed in good faith, and without design to mislead the public and acquire plaintiff's trade, the defendant, knowing the facts, must be held to the same responsibility as if it acted under the honest impression that no right of the plaintiff was invaded."

In *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, the court enjoined the use of a like name, and, in assigning reasons therefor, say: "Where the probable and ordinary consequences of a man's acts will be to benefit himself to the injury of another, his intention to produce that result may be legitimately inferred": See, also, *Red Polled Cattle Club v. Red Polled Cattle Club*, 108 Iowa, 105, 78 N. W. 803; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.* (C. C.), 121 Fed. 357; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.* (C. C.), 118 Fed. 657; *Glucose Sugar Refining Co. v. American Glucose etc. Co.* (N. J. Eq.), 56 Atl. 861.

Boston Rubber Shoe v. Boston Rubber Co., 149 Mass. 436, 21 N. E. 875, is not inconsistent with this holding. That was an application for the purpose of excluding defendants from exercising its corporate franchise. The court merely held that whatever remedy plaintiff was entitled to was of a private nature, and must be invoked in an action to enjoin.

Neither does *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 20 L. ed. 581, involve the issue presented. In that case rival coal companies owned ³⁰³ coal mines in the Lackawanna Valley, Pennsylvania, which produced the same general class of coal. The court barely held that the company first using the word "Lackawanna" in describing its coal was not, as a matter of law, entitled to exclude a rival from the use of this term for a like purpose, and found as a fact that such coal, in its generic character, was properly so designated.

We are of the opinion that the probable and ordinary consequences of the act, as distinguished from the specific intent or motive of the parties in choosing a trade name theretofore lawfully appropriated by others, must constitute the test. The use by defendants in such business of the name "Crookston Marble Works" will lead to confusion and delay in carrying on, and will injuriously affect, the business of plaintiffs who first rightfully adopted it. We are unable to find that the misdirection of mail intended for the Northwestern Marble Works operated to give its members a vested right in a name so erroneously used.

Judgment reversed, with directions to the trial court to amend its conclusions of law, and direct the entry of judgment in favor of plaintiffs, perpetually restraining defendants from in any manner using the name "Crookston Marble Works" in conducting the business of said corporation as a manufacturer and dealer in marble at Crookston, Minnesota.

An Injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the latter corporation to obtain the business of the prior one (Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769; Armington v. Palmer, 21 R. I. 109, 79 Am. St. Rep. 786), and the motive of the defendant in appropriating or simulating the name is not material: Koebel v. Chicago Landlords' Protective Bureau, 210 Ill. 176, 102 Am. St. Rep. 154.

LEHIGH VALLEY COAL COMPANY v. GILMORE.

[93 Minn. 432, 101 N. W. 796.]

CORPORATIONS—Foreign—Right to do Business in State—Presumption.—If failure of a foreign corporation to comply with the statute relating to the transaction by it, of business within the state, is relied upon as a defense, and such failure does not appear, on the face of the complaint, it must be presumed that such corporation has complied with the statute, and the burden is on the defendant to plead and prove his defense. (p. 444.)

W. G. White, for the appellants.

C. D. and T. D. O'Brien, for the respondent.

⁴³² BROWN, J. Action to recover the value of certain coal alleged to have been sold and delivered by plaintiff to defendants, in which, after trial before the court below without a jury, plaintiff had judgment, from which, after motion for a new trial, defendants appealed.

The complaint alleges that plaintiff, a foreign corporation duly created and existing under the laws of the state of Pennsylvania, and lawfully doing business in the state of Minnesota, at the times stated therein sold and delivered to defendants, at their special instance and request, goods, wares, and merchandise, consisting of coal of the agreed price and value of one hundred and twenty-one dollars and eighty-nine cents, for which amount, with interest, judgment was demanded. The answer admits the sale and delivery of the coal, but alleges in

defense that it was sold by sample; that prior to the time of the contract plaintiff exhibited to defendants a sample of coal, and that plaintiff agreed to deliver to defendants coal of the same kind and quality as the sample; and that the coal in fact delivered was not of the quality represented by the sample, but was inferior thereto, and defendants refused to accept it.

Defendants contend (1) that the evidence wholly fails to show a contract between the parties for the sale and delivery of the coal in question; (2) that, if a contract is shown, it is a different one from that alleged in the complaint; that the complaint alleges an express contract, and at most the evidence shows only an implied contract; (3) that the contract was void, being for the sale and delivery of property of a greater value than fifty dollars, under the statute of frauds; and (4) that no evidence was offered to show that plaintiff had in any manner complied with chapter 69, page 68, or chapter 70, page 71, Laws of 1899, prescribing conditions on which foreign corporations may do business in this state.

Our examination of the pleadings and evidence contained in the record leads to the conclusion that the evidence is amply sufficient to sustain the findings of the trial court to the effect that an express contract was made and entered into by the parties for the sale and delivery of the coal in question. The answer admits that defendants ordered the coal, and that, in pursuance of the order, plaintiff delivered it to them. There was therefore no failure of proof on this subject, nor a variance between the allegations of the complaint and the evidence.

⁴³⁴ There is no merit in the contention that the contract was void under the statute of frauds. While the value of the coal contracted for exceeded the sum of fifty dollars, there was a part performance of the contract on plaintiff's part by the actual delivery of the coal, which took it out from the operation of the statute.

Plaintiff is a foreign corporation, created and existing under the laws of the state of Pennsylvania, and there was in fact no evidence that it had complied with the statutes above referred to; and for this reason defendants urge that no recovery can be had by it. We do not concur in this contention. Plaintiff alleged in its complaint that it was a foreign corporation lawfully doing business in the state of Minnesota, but defendants did not answer, or at any time during the trial make the point, that it had failed to show a compliance with the statutes prescribing conditions upon which it might do business in this state.

The presumption is that plaintiff had complied with the law. We so held in the case of *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616. It was clearly incumbent upon defendants affirmatively to allege in their answer a failure on the part of plaintiff to comply with the statutes on this subject, and, having failed to do so, the defense is not available to them. The objection goes to the right of plaintiff to maintain the action, and, want of capacity not appearing on the face of the complaint, it could only be raised by answer: 15 Ency. of Pl. & Pr. 471; *State v. Torinus*, 22 Minn. 272.

We have considered all the other assignments of error discussed in appellants' brief, and find no reason for reversing the judgment appealed from, and it is affirmed.

Though a Foreign Corporation is prohibited from maintaining an action unless it complies with the statutes of the state, it need not allege such compliance in its complaint; in the absence of any showing to the contrary, it will be presumed to have complied, and if it has not the defendant must plead that fact in his answer: *Acme Mercantile Agency v. Rochford*, 10 S. Dak. 203, 66 Am. St. Rep. 714.

CITY OF ORTONVILLE v. GEER.

[93 Minn. 501, 101 N. W. 963.]

MECHANICS' LIENS—Mortgages—Priority.—A real estate mortgage on property, executed subsequently to the beginning of the continuous construction of a building thereon, is subordinate to the mechanics' liens of all who have contributed to the construction of the building. (p. 446.)

MECHANICS' LIENS—Mortgages—Priority.—A real estate mortgage on property on which a building is constructed, to be superior to mechanics' liens, must be executed and recorded prior to the first item furnished by any mechanic's lien claimant, so far as his own claim is concerned. (p. 447.)

E. N. Morrill, for the appellant.

C. E. Chrisman and Cliff & Purcell, for the respondent.

502 LOVELY, J. This action was brought by the city of Ortonville to foreclose a mechanic's lien upon a hotel building and lots in that city. Other lien claimants were made parties defendant, and the Charles Betcher Lumber Company, owners of real estate mortgages thereon, were also made defendants.

The action was tried to the court, and, upon findings of fact, judgment was ordered subordinating the liens of the mortgages to those of the lien claimants, which was duly entered. The mortgagee appeals.

It appears from the findings of the court that one Geer became the owner of several lots in the city of Ortonville; that thereafter construction was commenced upon a hotel building on the premises, and work thereon continued without interruption until its completion; that during the period of such construction the materials and labor of the several lien claimants were furnished; that subsequent to the commencement of the construction of the building, and during the erection thereof, but before any of the items of the claimants here for labor or materials were furnished, three mortgages on the property were executed to the lumber company, and duly recorded. The court then finds the amount due to each lienholder, and held that their liens take precedence of the recorded mortgages, which presents the distinct point of contention in this suit.

Laws of 1889, page 313, chapter 200 (Gen. Stats. 1894, c. 90) provides how liens shall be perfected, and, further, that when perfected in accordance with these sections they shall operate during the entire period of time from the furnishing of the first item of labor, skill, material, etc., until the expiration ⁵⁰⁸ of one year. Section 10 of this act provides that all such lien claimants shall share pro rata. In *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746, this statute was construed, and it was held that where work has been commenced in the construction of a building, and the course of such construction is continuous until its determination, a mortgage recorded during the interim must be subordinate to all lien claimants who shall have aided and filed their liens in conformity to law until the time their rights thereunder are terminated. The reasons are very fully stated for the result reached in that decision, particular force and effect being given to the inability to prorate among lien claimants on any other ground than the adoption of the result there reached, as well as the fact that lien claimants are not required to file their claims until after the entire bill of each has accrued, whereupon all such claimants are given certain privileges and benefits as to time in filing their liens, and the manifest statutory purpose is indicated to prefer the rights of those whose labor, skill, and material enhances the value of the property involved. *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746, was by a divided court, but followed *Glass v. Freeburg*,

50 Minn. 386, 52 N. W. 900, 16 L. R. A. 335, as to the relative rights of the lien claimants and mortgagees, respectively.

The same principle in this respect has been subsequently recognized in the cases of *Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543, and *Miller v. Stoddard*, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288, but it is claimed for the appellant that chapter 101, page 224, Laws of 1895, which reads as follows: "Such liens shall attach at the time of the furnishing of the first item of such labor, skill, material or machinery, and shall be preferred and be prior to any mortgage or other encumbrance of which the lienholder had no notice at the time of furnishing such first item and which mortgage or other encumbrance was unrecorded at the time such lien attached"—changes the rule as laid down in these cases, and shows a legislative purpose to subordinate lien claimants where mortgages are recorded prior to the first item furnished by any one of them, so far as his own claim is concerned. While the subject is not free from difficulty, in view of the fact that the cases referred to have established a rule of property right, as well as because of the reasons upon which they were rested, we have deemed it our duty to adhere to the same, unless by the ⁵⁰⁴ clearest expression of legislative intent a distinct intention to effect a change is shown.

In *Miller v. Stoddard*, 50 Minn. 272, 52 N. W. 895, 16 L. R. A. 288, it was held that an unrecorded mortgage executed before the work began was superior to mechanics' liens, and this defect was referred to in that case in the following language: "Had the statute contained the provisions . . . that mechanics' liens shall be preferred to any mortgage or other encumbrance, of which the lienholder had no notice, and which was unrecorded at the time such liens attached, all difficulty would have been avoided." Having reference to the law as laid down in this decision, and the necessity for compelling mortgagees to record their mortgages before the work on a building is commenced, to give them effective priority over labor and material lienors, we are led to the conclusion that this was the distinctive purpose of chapter 101, page 224, Laws of 1895, for, if the legislature intended more than this, it would have been very easy to have expressed this intention, in view of what had been previously decided, by declaring that the priority of all lien claims should depend upon the time when the first item had been furnished by any one of them, without regard to the commencement of the construction of the building. We are

therefore inclined to adhere to the previous decisions of the court in this respect, rather than to hold that the rule invoked by the respondent and sustained by the trial court has been changed in the respects claimed.

Judgment affirmed.

A Mortgage on Real Estate is subject to a lien for materials commenced to be furnished or labor commenced to be performed in the making of improvements thereon prior to its execution: *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779. See, too, *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 53 Am. St. Rep. 790. A lien for labor or material is paramount to the lien of a mortgage executed after the building was commenced, but before such labor or material was furnished: *Haxtun etc. Heater Co. v. Gordon*, 2 N. Dak. 246, 33 Am. St. Rep. 776. But see *Birmingham etc. Loan Assn. v. Boggs*, 116 Ala. 587, 67 Am. St. Rep. 147; *New Memphis Gaslight Company Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880; *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 75 Am. St. Rep. 862; *Weir v. Thomas*, 44 Neb. 507, 48 Am. St. Rep. 741.

WINSLOW v. McHENRY.

[93 Minn. 507, 101 N. W. 799.]

GIFT CAUSA MORTIS to be valid must be made in expectation of the donor's death. He must die of the disorder or peril existing or impending at the time the gift is made, and there must be a delivery of the thing given. (p. 450.)

GIFTS—Deposit in Bank.—If a person has made a deposit of money in bank for which he has received a certificate of deposit payable to the order of himself or wife on return of the certificate, so that his wife may collect the money after his death, and he retains the certificate in his possession until his death, there is no gift of the money, either causa mortis or inter vivos, and if, after his death, she indorses the certificate and collects the money, she is liable to her husband's administrator therefor. (p. 450.)

T. Bruener, for the appellant.

F. M. White, Reynolds & Roeser and H. Hansen, for the respondent.

508 **START, C. J.** Action by the administrator of the estate of Henry B. McHenry, deceased, to recover from the defendant two thousand one hundred dollars and interest, being the amount collected by her on a certificate of deposit for that amount issued by the Old Bank of St. James, Minnesota. This certificate was dated October 30, 1901, and, so far as here material, was in these words: "Henry B. McHenry has deposited in this

bank two thousand one hundred dollars payable to the order of himself or wife upon the return of this certificate properly indorsed."

The complaint alleged in effect, that Henry B. McHenry died intestate March 11, 1902, and at the time of his death was the owner and in possession of this certificate; that thereafter the defendant obtained possession thereof, and collected it from the bank, receiving thereon two thousand one hundred and seventeen dollars as principal and interest; and further that the plaintiff was duly appointed administrator of the estate of the deceased, and demanded from the defendant the money so collected by her, which she refused to pay to the plaintiff.

The answer denied that the plaintiff's intestate was the owner of the certificate at the time of his death, and alleged that the defendant was the wife of the intestate, and the person referred to in the certificate as his wife, and that she was the owner of the certificate, and entitled to the money represented by it.

The case was tried by the court without a jury, and findings of fact made to the effect that the defendant was never the owner of the ⁵⁰⁰ certificate of deposit, but that the plaintiff's intestate was at the time of his death the owner and in possession of the certificate; and, as a conclusion of law, judgment was directed for the plaintiff. The defendant appealed from an order denying her motion for a new trial.

Practically the only question presented by the record is whether the findings of the trial court are sustained by the evidence. If the undisputed evidence establishes a gift causa mortis of the certificate to the defendant, the findings are not sustained by the evidence; otherwise they are. There is little, if any, conflict in the evidence, which is ample to establish these facts: The intestate was the owner of two thousand one hundred dollars, and on October 30, 1901, he went, with the defendant, to the bank, having the money with him. He there introduced to the cashier of the bank the defendant as his wife, and stated that he desired to have the money deposited in the name of himself and wife, so that, if he should die, she could collect it. He then deposited the money, and the certificate of deposit in question was made and delivered to him by the cashier. The intestate's health was then impaired, and so continued to be until March 11th following, when he died. Upon receiving the certificate from the cashier, the intestate put it in his pocket, and when he reached home he put it in his trunk, to which there were two keys, one of which the defendant had. It re-

mained until after his death in his trunk, when the defendant took it therefrom, indorsed it, and received the amount thereof from the bank.

These facts do not, as a matter of law, establish a gift *causa mortis* or *inter vivos* of the money represented by the certificate to the defendant. On the contrary, they fully sustain the findings of the trial court. To constitute a gift *causa mortis*, three things are essential: It must be made in expectation of the donor's death, he must die of the disorder or peril existing or impending at the time the gift is made, and there must be a delivery of the thing given: *Allen v. Allen*, 75 Minn. 116, 74 Am. St. Rep. 442, 77 N. W. 567; *Davis v. Kuck*, 93 Minn. 262, 101 N. W. 165. Now, waiving all other questions, it is clear from the evidence that there was no delivery of the certificate or the money it represented to the defendant. The money was not deposited in her name or for her. Unless the certificate was delivered to her, so that she could indorse and present it for payment, she could not control or secure the money. But the evidence is practically conclusive that the intestate kept possession⁵¹⁰ and control of the certificate as long as he lived, and that he never actually or constructively delivered it to the defendant at any time; hence at no time before his death was dominion or control over the deposit or the certificate given to or vested in the defendant.

For the same reason, if for no other, there was no gift *inter vivos* of the money or certificate to the defendant. The case of *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454, 85 N. W. 915, 52 L. R. A. 849, cited and relied upon by counsel, is not here in point. In that case the trial court found, in effect, as a fact, that the donor's intention to make a gift of money in a bank on deposit in her name was effectuated by an act whereby dominion over the money and the absolute right to it were conferred upon the donee, or, in other words, that there was a delivery of the thing given; and this court held the finding sustained by the evidence. But in this case the trial court did not find any delivery of the thing alleged to have been given. Nor did the evidence, as a matter of law, require such a finding.

Order affirmed.

Gifts Causa Mortis of Bank Deposits are discussed in the monographic note to *Johnson v. Colley*, 99 Am. St. Rep. 902-905. The mere delivery of an unindorsed certificate of deposit payable to the donor's order does not vest title so as to constitute a gift: *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 777. And where a railway employé becomes a depositor in the company's saving fund under an

agreement which preserves to him the right to deal with the deposits for his own benefit, but which provides that upon his death any balance standing to his credit shall be paid to his wife, this agreement and the delivery of the pass-book to his wife, do not constitute a valid gift *inter vivos*: *Stevenson v. Earl*, 65 N. J. Eq. 721, 103 Am. St. Rep. 790. But if the holder of a bank-book delivers it to another with an order directing that the amount due be paid to the latter, who afterward retains the possession of such book, this constitutes a gift of such amount: *Matter of Barefield*, 177 N. Y. 387, 101 Am. St. Rep. 814.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

FINCK v. SCHNEIDER GRANITE COMPANY.

[187 Mo. 244, 86 S. W. 213.]

CORPORATIONS—Collateral Attack on—Illegal Combinations. The very validity of the corporate organization may be collaterally assailed when an unlawful conspiracy to stifle trade and create a monopoly exists in the articles of association of the corporation. (p. 466.)

CORPORATIONS—Attacking Validity of.—An answer setting up the invalidity of the contract in suit entered into between defendant and a corporation to whose interest plaintiff had succeeded, and which was organized to carry out that and similar contracts, is not subject to the objection of attempting to collaterally attack the validity of the corporate charter. (p. 466.)

CONTRACTS—Prevention of Competition in Trade.—The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties thereto, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid, but if the latter, it is void. (p. 466.)

CONTRACTS in Restraint of Trade—Illegal Combinations.—A combination of corporations engaged in one and the same line of business organized by a series of contracts between each corporation individually and a constituent corporation having a merely nominal capital, and composed of one member from each of the combining corporations, by which contracts it is agreed that the individual contracting corporation will sell all of its product for a certain number of years to the constituent corporation at a fixed price, and will not sell to anyone else, and will pay a penalty, made so high as to be prohibitory, in case of such unauthorized sales, the purpose and result of which are to create a virtual monopoly in that particular line of business and to prevent any competition therein, is illegal and void. (p. 467.)

CONTRACTS in Restraint of Trade—Illegal Combinations.—A contract, valid in itself, may become illegal if it is one of several, all of which are links and necessary elements in forming an illegal

combination and monopoly intended to work, and which do work, an injury to the public in unduly raising prices of a commodity, so long as such combination continues. (p. 468.)

CONTRACTS in Restraint of Trade —Illegal Combinations.—If a contract is a continuing one and legal when made, the fact that it is declared illegal as in restraint of trade and as creating a monopoly, under a statute which is a valid exercise of the police power, enacted after the execution of the contract, does not give to such statute a retroactive effect. (p. 471.)

G. W. Lubke, for the appellants.

Dickson, Smith & Dickson, for the respondent.

²⁵¹ **BRACE, P. J.** This is an appeal from a judgment of the St. Louis City circuit court in favor of the defendant, from which the plaintiffs appeal.

By consent the cause was "referred to James A. Seddon, Esq., to try all the issues involved therein and report his proceedings to the court."

Upon the coming in of his report, exceptions thereto were filed, which having been duly considered, were overruled, the report confirmed and the judgment rendered from which plaintiffs appeal.

The report of the referee is as follows:

"FINDINGS OF FACT.

"The referee makes the following findings of facts:

"Crushed granite is chiefly used in the construction of granitoid sidewalks or streets. In this construction it is an essential element. Such sidewalks are of recent origin. Crushed granite is manufactured by crushing in mills fragments of granite, technically called 'spawls.' In 1891 and during the whole period covered by the controversy in this case, the only source of the supply of spawls for the market of the city of St. Louis was the southeastern portion of the state of Missouri, adjacent to the Iron Mountain Railroad. Indeed, there was no other granite proper for making crushed granite ²⁵² within five hundred miles of St. Louis. All of the spawls crushed and crushed granite sold in St. Louis came over that railroad and into its depot in that city. The city of St. Louis was the market for crushed granite for the state of Missouri and portions of other states lying east of the Mississippi river. Crushed granite was sold from the market of St. Louis to Chicago, Cincinnati and points in Illinois, Indiana, Kentucky and Tennessee. During this period spawls were worth at the quarries in southeast Missouri about sixty-seven and one-half

cents. The freight to St. Louis was about eighty cents. The market price of spawls in the St. Louis market was about one dollar and forty-seven and one-half cents. This price would vary slightly from time to time. In the early part of the year 1891, and just preceding March, 1891, crushed granite was worth in the St. Louis market in carload lots, free on board the cars at the Iron Mountain depot of the Iron Mountain Railway Company, on an average of two dollars and twenty-five cents per ton, which price would slightly vary according to the demand. At the prices prevailing in the St. Louis market prior to March, 1891, there was a fair, reasonable and living profit to those engaged in the manufacture and sale of crushed granite. Competition was lively and keen but healthy, and the business was active and on a good basis. Prior to March, 1891, the following were the only parties owning crushing-mills engaged in the business of manufacturing and selling crushed granite in the St. Louis market; that is to say:

"The Schneider Granite Company (a corporation, Philip W. Schneider, president), whose crusher was at Graniteville, Missouri, on the Iron Mountain Railroad in the southeastern portion of the state.

"Finck Milling Company (a corporation, John C. Finck, Jr., president), whose mill was situated in St. Louis.

"The Pickel Granite Crushing Company (a corporation, George Pickel, president), whose crusher was in St. Louis.

²⁵³ "Eyermann & Schmalz (a firm composed of Gottlieb Eyermann, Jr., and ——— Schmalz), whose crusher was at ———.

"Stifel & Ruckert (a firm composed of Philip W. Stifel and ——— Ruckert), whose crusher was situated at Graniteville, Missouri.

"P. M. Bruner, whose crusher was in St. Louis.

"Milne & Gordon, whose crusher was in St. Louis.

"Bruner was engaged largely in the business of constructing sidewalks and other granitoid work in St. Louis. He was a large contractor and practically consumed all of the crushed granite which was manufactured by himself.

"Milne & Gordon were small manufacturers and manufactured about sixty tons of crushed granite a day during the crushing season.

"In May, 1891, after the combination hereinafter referred to, John J. Steffen, a contractor, erected a mill in St. Louis for crushing granite. He consumed his product. He had made

in 1890 a fifty thousand dollar contract for the construction of granitoid work in the year ending July 1, 1891. He relied upon being able to purchase, as he had always done, at competitive rate, the crushed granite which he would need to fill his contract. But after the said combination went into effect on March 5, 1891, he was notified by Mr. George Pickel that his company could not deliver any more granite at former prices, and he was not able to get the granite necessary to fill his contract at the former prevailing prices. Being met with a sudden and arbitrary increase in the price of material, to save himself a large financial loss he erected as aforesaid, in May, 1891, a mill to supply his own consumption. The average daily output of crushed granite in 1891, prior to March of that year, in St. Louis, for the open market was from eight hundred to one thousand tons daily. Of this Milne & Gordon furnished from fifty to sixty tons a day. The rest was furnished by the first five of the above-named manufacturing concerns, to wit, Schneider Granite ²⁵⁴ Company, Finck Milling Company, Pickel Granite Crushing Company, Eyermann & Schmalz and Stifel & Ruckert.

“Should these five parties combine to put prices up arbitrarily they could easily do so, as they manufactured nearly all of the crushed granite sold in the city of St. Louis. In the early part of 1891 it was obvious to these parties that the city of St. Louis was on the eve of a large expansion in the construction of street sidewalks. The city had adopted an ordinance under which a large amount of such work of a public nature would have to be done. There had also been projected numerous large subdivisions and additions to the city of St. Louis, such as Chamberlain Park and others, intended to be put upon the market for sale for residence purposes. These called for a large amount of sidewalk construction in the immediate future. These five concerns realizing these conditions fully, and that they could by combining together arbitrarily raise the price of crushed granite to those who should absolutely need it, confederated together and concocted a scheme for combining together to arbitrarily control and maintain the price of crushed granite in the market of the city of St. Louis, prevent natural and healthy competition and realize a practical monopoly of the market of St. Louis in restraint of trade. In pursuance of this scheme they agreed together to form a corporation which should have a capital stock of two thousand dollars. The capital was merely nominal and quite inadequate for the professed purposes of the

intended organization. Philip W. Schneider, Philip F. Stifel, George Pickel, Gottlieb Eyermann, Jr., and John C. Finck, Jr., were to become incorporators of the company, each as the representative of his business concern. These concerns were in reality to own the stock. These different firms and corporations were to make contracts with the company, agreeing to sell all of their product of crushed granite for the next five years to the company at the stipulated sum of two dollars,²⁵⁵ and were to agree not to sell spawls to anyone not in the combination, except at a penalty which would be prohibitory, the purpose being to diminish the chance or altogether prevent other parties from building crushing-mills, and entering into competition with them. This agreement was to be enforced by prohibitory penalty of one dollar and fifty cents per ton imposed for every ton of crushed granite which should be sold to outsiders. The sales of crushed granite were to be made by the different members of the combination to the public as theretofore, but the sales were to be made in the name of the St. Louis Crushed Granite Company. The only business which it was contemplated that the company should do was purely routine, to keep a set of books, to record the sales, to receive the moneys realized therefrom, and to divide the profits of the combination amongst the parties interested in the proportion to the stock held by each of them. It was contemplated that all the business of the company could be done by one person, a secretary. The avowed purpose of these parties was to improve their condition by arbitrarily raising the price of crushed granite in the market in the city of St. Louis, which meant the whole of Missouri and the neighboring markets in other states which were supplied by the St. Louis market.

“In pursuance of this scheme of confederacy, Philip F. Stifel, representing the firm of Stifel & Ruckert; Philip W. Schneider, representing his corporation, the Schneider Granite Company; George Pickel, representing his corporation, the Pickel Granite Crushing Company; Gottlieb Eyermann, Jr., representing his firm of Eyermann & Schmalz, and J. C. Finck, Jr., representing his corporation, the Finck Milling Company, as incorporators, organized and incorporated a corporation under the laws of Missouri, relating to business corporations, under the name ‘St. Louis Crushed Granite Company,’ with a capital of two thousand dollars, divided into five shares of four hundred dollars each. Each of these five persons appeared in²⁵⁶ the articles of association as a subscriber to one share of the par value

of four hundred dollars. The articles of association recited that one-half of the capital stock had been paid up in lawful money of the United States, and that it was in the custody of the persons named as the first board of directors. Immediately after the formation of the corporation, it was agreed amongst all of the stockholders that they should retain the first fifty per cent of the capital stock until the same should be called for. The object of the corporation was set forth in the articles of incorporation as follows: "The object, purpose and business for which this corporation was formed shall be the buying and selling of crushed granite and generally to transact such business incident thereto, including to contract for the purchase and sale of said articles and handling the same on commission."

"The certificate of the Secretary of State was dated the third day of March, 1891. The charter provided that the company should exist for the period of five years only. Each of the incorporators indorsed on the certificates of stock which were issued to him a declaration to the effect that he held the stock as trustee for the business concern of which he was a member, and which he represented in the corporation. The dividends which were declared were received by the above incorporators and were paid to their respective business concerns. The following contract was made on the fifth day of March, 1891, between the St. Louis Crushed Granite Company and the Schneider Granite Company:

" "This agreement entered into in duplicate this fifth day of March, A. D. 1891, at the city of St. Louis, state of Missouri, by and between the St. Louis Crushed Granite Company, a corporation under the laws of Missouri, party of the first part, and Schneider Granite Company, a corporation of the city of St. Louis, party of the second part, witnesseth:

" "That, whereas, said party of the first part has ²⁵⁷ been incorporated with authority to buy, sell and generally to deal in crushed granite, upon its own account, and also on commission for others; and whereas, said party of the first part has offered to purchase from said party of the second part all the crushed granite which said party of the second part during the period of five years after the date hereof may crush at the plants of said party of the second part situated near Graniteville, Iron county, Missouri, and whercas, said party of the second part has accepted said offer; now, therefore, said parties have mutually agreed upon the following prices, terms, conditions and penalties in the matter of the performance of said contract between them, namely:

“That the said party of the second part will sell and deliver such crushed granite during said period of five years, upon the orders of said party of the first part, at such of the places hereinafter mentioned as the party of the first part may from time to time require at the following prices, that is to say: at two dollars per ton free on board cars in Iron Mountain Railroad Company's yards, St. Louis, or at one dollar per ton, free on board cars, at crusher, near Graniteville, Iron county, Missouri.

“And said party of the first part agrees to pay the party of the second part in cash at the prices aforesaid on the twentieth day of every month for all granite delivered by the party of the second part as aforesaid, the preceding month.

“The said party of the first part also agrees to order from the party of the second part from time to time during the period aforesaid of the entire quantities of said articles which said party of the first part may need in its business from time to time an amount equal to the numerical proportion which this contract may bear to the whole number of like contracts which said party of the first part may have made in good faith and which may be in force with responsible proprietors of other granite plants; and the party of the second part ²⁵⁸ agrees to meet and comply with all such orders. And if at the end of said five years the party of the second part have on hand in its said plants any crushed granite, the party of the first part will take the same and pay therefor the prices aforesaid. The party of the second part also agrees as part of the consideration to the party of the first part for making this contract, that said party of the second part will account with and pay over to the party of the first part in the monthly settlements the sum of one dollar and fifty cents per ton for all spawls to be turned into crushed granite, where the same is used with cement, which during the preceding month may have been sold and delivered by the party of the second part from the plants aforesaid, except that such payment will not be made for spawls which may have been sold to anyone with whom the party of the first part has an existing contract like this one.

“And finally it is expressly understood between said parties that the neglect or failure after reasonable notice of the party of the second part to perform this agreement in respect of deliveries of crushed granite (excepting only when caused by strikes, fire or disabling injury to plant) shall entitle the party of the first part to demand and receive in the monthly settle-

ments from said party of the second part penalty equal to fifty cents per ton for the first ten days and one dollar per ton thereafter on all crushed granite which the party of the second part may have neglected to furnish when required as aforesaid, and the said penalty shall continue chargeable until said party of the second part resumes making deliveries.

“In witness whereof said parties have executed this instrument, the party of the first part acting herein under a resolution of its board of directors, by the signature of its president with its corporate seal attached; and the party of the second part by

“SCHNEIDER GRANITE COMPANY,

“PH. W. SCHNEIDER, Prest.

259 “Schneider Granite Company (Seal).

“ST. LOUIS CRUSHED GRANITE CO.,

“Per J. C. FINCK, Jr., Prest.

“Attest: JULIUS A. SCHNEIDER, Secy.’

“The penalty of one dollar and fifty cents per ton for selling spawls was prohibitory. No one could sell them and pay the penalty without serious financial loss. The provision was tantamount to a provision not to sell the spawls to outsiders.

“The same contract was made on the same day by the St. Louis Crushed Granite Company with the four other firms and corporations represented in the scheme and combination. They sold crushed granite as they did prior to the formation of the corporation, except that it was a rule that the sales were to be made in the name of the company, which rule, however, was not always observed and the sales were not always promptly reported to the company. The company was forced to issue circulars to the trade directing purchasers to pay direct to the company. The company had no depot or yards of its own for crushed granite. Three of the yards or depots of the members of the corporation were situated in the west end of the city along the Missouri Pacific tracks in the neighborhood of Grand avenue, a principal thoroughfare north and south, near each other, and the other two were situated on Barton street in the southern portion of the city opposite to each other. Deliveries were made from these yards, as it proved most convenient to the company. The company owns no crushers, and was not engaged in the active business of manufacturing crushed granite. It kept an office which consisted of one room with telephone and fixtures. Its business was of a routine nature and was transacted by one person, its assistant secretary, who received a salary which was

for part of the time one hundred dollars, and for the rest of the time seventy-five dollars a month. He received the reports of the sales made by the different firms and corporations in the combine, collected the money accruing from ²⁶⁰ such sales, and entered these items in the books. With the exception of fixing the prices of crushed granite this was substantially all the business which the company transacted. It existed merely as a cover or agency under which the scheme to raise prices was worked out. It was a mere agency for distributing the profits of the scheme to its different members operating under the corporate name. Immediately upon its organization, the company passed a resolution arbitrarily fixing the price of crushed granite in the city of St. Louis at a price averaging about eighty cents above the then prevailing market rate, according to the place of delivery and the required haul. As a result the price of crushed granite immediately advanced in the market of the city of St. Louis correspondingly. This was an arbitrary price which was established and maintained by reason of the combination and not as a result of natural, normal competition. There was practically no competition after it went into effect and as long as this combination existed. On the 19th of October, 1891, the defendant, the Schneider Granite Company, withdrew from the combination and began to manufacture and sell crushed granite on its own account in large amounts in the market of St. Louis. The price of crushed granite in the market immediately thereafter dropped to its former price existing before the combination went into effect.

"On October 26, 1891, the St. Louis Crushed Granite Company found it necessary to reduce the price of its product to the prices prevailing before March, 1891, in order to meet the competition. The referee finds that those in this combination were able to raise and did arbitrarily raise the price of crushed granite on the average of about eighty cents a ton in the open market of St. Louis during the period from the fifth day of March, 1891, to the nineteenth day of October, 1891, and that when they made the combine they made it with the intention to do so and were satisfied that they could ²⁶¹ do so. During this period the prices were so far in their control that they could and did stifle healthy competition in the crushed granite trade in the St. Louis market, and did extort from consumers purchasing in the said market large amounts of crushed granite sold them at prices far in excess of the prices which would have been naturally normal, if such combination had not existed.

When this combination was broken by the withdrawal of one of its most powerful allies, what was left of the combine immediately reduced the price of crushed granite, which fell to its normal figure established by the competition in the market which had practically ceased to exist while the combination held together in its integrity.

"On the 19th of October, 1891, the Schneider Granite Company wrote to the St. Louis Crushed Granite Company the following letter:

"Dear Sirs:

"Our attorneys have advised us that the agreement entered into on the fifth day of March, 1891, between our company and the St. Louis Crushed Granite Company, is in conflict with the provisions of the act of the Missouri General Assembly, approved April 2d, last, providing for the punishment of pools, trusts, etc., to control prices, etc., and that if we continue further to comply with the terms of our agreement not only will we be subjected to the payment of large penalties and the charter of our company be declared forfeited by the courts, but that such compliance may be used as a defense to any suit that we may hereafter be compelled to bring arising out of the large contracts for granite, etc., which our company is filling.

"We therefore respectfully notify you that we shall no longer recognize the agreement of March 5, 1891, as binding upon us, and shall comply no further with its provisions.

262 "Respectfully,

"PH. W. SCHNEIDER,

"President Schneider Granite Company."

"Thereupon, the St. Louis Crushed Granite Company immediately wrote to the Schneider Granite Company the following letter:

"St. Louis, November 7, 1891.

"Schneider Granite Company, St. Louis, Mo.

"Gentlemen: We beg leave to inform you that at a meeting of the board of the St. Louis Crushed Granite Company held on November 7, 1891, the following proceedings were held and spread upon the record by said company, viz.:

"The president reported to the meeting that on October 2d, last, an order was sent to the Schneider Granite Company to deliver one hundred tons crushed granite to the George Pickel Granite Crushing Company at Twenty-first street in this city,

that compliance with said order was refused by the Schneider Granite Company, and that coupled with such refusal there was also a message to the St. Louis Crushed Granite Company that said Schneider Granite Company peremptorily refused to fill any further orders of the St. Louis Crushed Granite Company under the contract existing between these companies dated March 5, 1891. Upon consideration by the board of this report of the president, the board resolved that notice be given in writing by the president and secretary of the St. Louis Crushed Granite Company to said Schneider Granite Company, that the former company is ready to take all the crushed granite which by said contract of March 5, 1891, the Schneider Granite Company has contracted to sell to the St. Louis Crushed Granite Company, and that if the Schneider Granite Company disposes of any of its granite covered by said contract to persons or parties other than the St. Louis Crushed Granite Company, ²⁶³ the company last named will charge against the Schneider Granite Company the penalty of one dollar per ton on all such granite thus wrongfully disposed of by said Schneider Granite Company in violation of said contract, and that the St. Louis Crushed Granite Company will insist upon the full payment of these penalties by every means legal and equitable; it was also resolved that the notification to be thus sent to said Schneider Granite Company incorporate a copy of the foregoing report and of these resolutions.

“‘Please advise us of the receipt by you hereof, and oblige

“‘Yours respectfully,

“‘J. C. FINCK, Jr., President;

“‘PHIL. F. STIFEL, Secretary,

“‘St. Louis Crushed Granite Company.’

“On October 19, 1891, the Schneider Granite Company withdrew from the combination and never recognized its contract or did anything to perform it. No further demands were made on it by plaintiff, and it made no further deliveries under the contract.

“At the trial before the referee the defendant made the following admission:

“‘That between October, 1891, and March, 1896, being the date when the Schneider Granite Company withdrew from the St. Louis Crushed Granite Company and refused further to furnish granite, and the date of the expiration of the contract sued on, it crushed and sold at least sixty thousand tons of crushed granite as alleged in the petition.’

"Between the nineteenth day of October, 1891, and the 5th of March, 1896, the market value of crushed granite varied from two dollars, a minimum, to three dollars, a maximum, free on board the cars at the Iron Mountain depot in the city of St. Louis at wholesale, viz., in carload lots. It would be sold in smaller lots depending on the size of the order, from two dollars and twenty-five cents to three dollars and twenty-five cents. At the above price it sold in the open market.

²⁶⁴ "The evidence is not sufficient to enable the referee to state what was the market price per ton each day on any specified day during that period, or to state for how many days or for what period the market was at its minimum and at its maximum. The average of the minimum and maximum of the market price per ton in carload lots f. o. b. cars in Iron Mountain depot, St. Louis, during that period was two dollars and fifty cents. While the evidence shows the total amount of the output of crushed granite of the Schneider Granite Company between those dates, it does not show the output for any one day or for any one period and it does not show the market price prevailing at the time of any one output, or any one sale by the Schneider Granite Company or on the date of expiration of the five year period of the contract.

"CONCLUSIONS OF REFEREE UNDER THE LAW AND THE FACTS.

"Plaintiff alleges that on March 5, 1891, plaintiff and defendant made an agreement by which the defendant agreed to sell and deliver to plaintiff all the crushed granite which the defendant, during the period of five years thereafter, might crush at its plant upon the orders of the plaintiff at the price of two dollars per ton free on board cars at the yards of the Iron Mountain Railroad Company in St. Louis, or at the rate of one dollar per ton free on board cars at defendant's crusher; that in case of failure of defendant to conform to the agreement in respect to the deliveries of crushed granite, with certain exceptions not important in this case, the plaintiff was to be entitled to receive the sum of fifty cents a ton for the first ten days of failure and one dollar per ton thereafter on all crushed granite which the defendant might neglect to deliver; that the defendant performed its contract until about the nineteenth day of October, 1891, when it declined and refused to do so, which refusal it has persisted in, although the plaintiff has been constantly ready and willing to receive and ²⁶⁵ has demanded the same from the defendant; that the plain-

tiff between the said nineteenth day of October and the expiration of the contract, March 5, 1896, neglected and refused to furnish plaintiff sixty thousand tons of crushed granite, to its damage in the sum of sixty thousand dollars.

"The answer of the defendant, after making certain general denials, sets up the special defense that the contract also provided that the plaintiff should order from the defendant from time to time during the period of five years of the quantity of crushed granite which the plaintiff might need in its business, an amount equal to the numerical proportion which the contract might bear to the whole number of like contracts which the plaintiff has made in good faith with responsible proprietors, and that at the end of five years the plaintiff could take all the crushed granite which the defendant had at that time on hand at the prices mentioned in the contract; also that the defendant should pay to the plaintiff in its monthly settlements one dollar and fifty cents per ton for all spawls which had been turned into crushed granite and used with cement which during the preceding month might have been sold by the defendant, but that no such price was to be paid where a contract similar to the one in suit existed between the plaintiff corporation and the party to whom the said spawls were sold; that the plaintiff company was a corporation organized by the chief crushed granite dealers in St. Louis for the purpose of carrying out an agreement to control all of the crushed granite offered in the market of that city, and that the said dealers were all and the sole shareholders therein; that contracts similar to the one sued on were entered into between the plaintiff and substantially all the other crushed granite dealers in the city of St. Louis, Missouri, and were made in pursuance of an agreement entered into by said dealers for the purpose of controlling the quantity of crushed granite which should be offered for sale in the ²⁸⁶ market of the city of St. Louis and for the further purpose of advancing and controlling the price by the means thereof; that until the withdrawal of the defendant from said combination on the nineteenth day of October, 1891, the parties and persons engaged therein did actually control the market and advanced and kept up the price of crushed granite; that said agreement and combination was in restraint of trade, illegal and invalid, and was in violation of the statute law of Missouri, and the interstate commerce law; that the defendant did notify the plaintiff on the nineteenth day of October, 1891, that it had withdrawn from the contract and

the unlawful combination; that the plaintiff was not a corporation under the laws of the state of Missouri at the time of this suit.

"The answer was supported by an affidavit in due form.

"After the filing of the petition, April 12, 1898, John C. Finck, Jr., Philip F. Stifel and Gottlieb Eyermann, Jr., made a motion in the case for an order to substitute themselves plaintiffs in the case, on the ground that the charter of the St. Louis Crushed Granite Company had expired by limitation, in March, 1896, and that at that time the said parties were the officers and directors of the company.

"On June 11, 1898, the court entered an order sustaining said motion and substituted said parties as plaintiffs, but no amended petition was filed by these substituted parties. The case went to trial upon the original petition and answer.

"It will be seen from the pleadings that the defendant sets up a denial that it has sold sixty thousand tons and that the plaintiff was damaged thereby in the sum of sixty thousand dollars, and also the special defense that the contract sued on is void because the same is in restraint of trade, and illegal and void, and in conflict with the statutes of Missouri, and the United States, forbidding such combinations and agreements. The facts substantiating these ²⁶⁷ facts are set up. The mere statement of the illegality of the contract and its conflict with the statute are allegations of law and add nothing to the facts pleaded.

"The issues therefore are: 1. Is the contract sued on a legal or illegal contract? 2. If it is a legal contract, what is the measure of damages, the defendant having admitted that it had manufactured and sold between the nineteenth day of October, 1891, and the expiration of the contract, sixty thousand tons of crushed granite?

"Upon the issue whether the contract is valid or void as in restraint of trade, it is contended by the plaintiffs:

"1. That the validity of the charter of the St. Louis Crushed Granite Company cannot be collaterally assailed in this suit, and that the contract of March 5, 1891, with the defendant, is merely a contract of one individual to take its entire output for a specified period, and, therefore, it is not invalid under the principles of common law.

"2. That the contract is not illegal by virtue of any statute of Missouri; that the statute of 1889 of the state of Missouri against pools, conspiracies and trusts which went into force

on March 5, 1889, was unconstitutional, and was so held by the supreme court of Missouri in the case of *State v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

"That, at any rate, this statute was expressly repealed by the act of the state of Missouri of 1891, which can have no retroactive effect, and that, therefore, there is no statute of Missouri under which the contract can be held to be illegal.

"Taking up these propositions separately, the referee is of the opinion that the defense does not necessarily assail the validity of the charter. The validity of the contract in suit is assailed on the ground that it is in violation of the policy of the law of this state as ²⁶⁸ declared by both the common law, the statute of the state, and the statute of the United States. It is the use to which the corporate organization is put which is here assailed. The corporation is a valid corporate entity. It can carry out in good faith the purposes declared in its articles of association, which as declared are legitimate enough. The corporation simply departs from these declared purposes and suffers itself to be used as a cover for making effective a conspiracy against the law, admitting, of course, that there is such a conspiracy. That is the real question.

"If this is such an illegal conspiracy then the referee is of the opinion that this contract is plainly beyond the powers and scope of the corporation. In so holding, no objection is made to the validity of its corporate existence. It can proceed to do all things that are legal and proper for it to do. But if it were necessary, there is not wanting authority to sustain the proposition that the very validity of the corporation organization may be collaterally assailed where the unlawful conspiracy exists in the articles of association of the corporation. This point was distinctly decided by the St. Louis court of appeals in the controlling case of *National Lead Co. v. Grote Co.*, 80 Mo. App. 247. The court cites ample authorities to sustain its position in that case.

"The referee is not satisfied that the proposition of the learned counsel for the plaintiff can be sustained, that the combination shown in this case is not illegal under the principles of common law. In determining the validity at common law of such combinations and contracts which are essential parts of them, the true test is whether they afford fair and just protection to the parties or whether they are so broad as to 'interfere with the interests of the public': *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159; *Craw-*

ford v. Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Bennett v. Dutton, 10 N. H. 481; ²⁶⁹ White v. Hunter, 23 N. H. 134; Weld v. Lancaster, 56 Me. 453.

"Certainly the combination in this case was such as to seriously injure those who wished to buy crushed granite in the city of St. Louis and the neighboring markets.

"We do not understand that the case of Wiggins Ferry Co. v. Chicago etc. R. R. Co., 73 Mo. 389, 39 Am. Rep. 519, announces any different principles. In that case there was under consideration a contract between the railroad company and the ferry company to give to the latter by the former all of the ferriage of its freight and passengers across the Mississippi from East St. Louis to St. Louis for a period of years. The court sustained this contract as not so far in restraint of trade as to be illegal. It said (page 411): 'The space in which the restriction is to operate is limited to the Illinois shore opposite the city of St. Louis, and is only a partial restraint in that space, the restriction being not that the defendant will not employ any ferry at all, but that it will only employ that of plaintiff. We cannot say from anything appearing in the contract that such limitation is unreasonable and it is not, therefore, obnoxious to the rule.'

"The case of Gill v. Ferris, 82 Mo. 156, cited by counsel, announced the familiar proposition that: 'A contract not to engage in a particular business, at a specified place, for a limited time, is not invalid as being in restraint of trade.'

"If this contract in suit stood alone it would undoubtedly be sustained, but it did not stand alone. It was one of five others, all of which were links and necessary links in the illegal combination which rendered them illegal.

"A careful inspection of the case of Clark v. Frank, 17 Mo. App. 602, cited by plaintiff's counsel, shows that it is not in point at all.

"The case of Skrainka v. Scharringhausen, 8 Mo. App. 522, presents some features very similar to the ²⁷⁰ one at bar and was rightly decided on the particular facts before the court. But these facts in principle are radically different from those in the case at bar. The court said: 'The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. There is no evidence that it works any public mischief, and the contract is not of such a nature that it is apparent from its terms that it tends to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition.'

"The evidence in the case at bar shows that the combination of which the contract in suit was an essential link was intended to work and did work serious public injury and did unduly raise prices so long as it held together in its original integrity. It did tend to cause a monopoly and to restrict competition.

"The court also says on page 525: 'Where the contract injures the parties making it by diminishing their means of supporting their families, tends to deprive the public of the services of useful men discourages industry, diminishes production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry and engrosses the market—tends to make a "corner," to use the slang of the stock and provision gamblers—it is against the policy of the law.'

"Taking up the second point of the plaintiff's argument, that the contract in suit violates no statutory law of the state of Missouri, we find that the state of Missouri passed an act on May 18, 1889 (Laws 1889, p. 96), which provides that if any association of persons, corporation or partnership, 'shall create, enter into, become a member of or a party to any pool agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any ²⁷¹ pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, they shall be guilty of a conspiracy to defraud.' This act remained in force until the law of 1891, approved on April 2, 1891 (Laws 1891, p. 186), expressly repealed the act of 1889, but by the act of 1891 the state of Missouri re-enacted that portion of the act of 1889 which has just been quoted in almost identically the same terms. The combination which appears in the suit at bar is undoubtedly condemned as unlawful by the express terms of both of these acts.

"The referee cannot agree with the learned counsel of the plaintiff that the law of 1889 was declared void in the case of *State v. Simmons Hardware Co.*, 109 Mo. 118. So far from holding the law unconstitutional and void in that case the supreme court of Missouri impliedly held it good, for in that case the Simmons Hardware Company was prosecuted because it had failed to make a certain declaration under oath to the

Secretary of State which was required by one of the sections of the law of 1889. The court might have held that the defendant was not guilty, because the whole law was unconstitutional and void, but it did not do so. On the contrary, it held that the defendant was not guilty because the law being valid made certain things unlawful and imposed certain penalties for violating the law, yet required the defendant to accuse itself by its own sworn return of its resolution. The decision was distinctly based upon the proposition that where one is unlawfully subject to pains and penalties and a criminal prosecution for violating a law, any provision requiring the accused to give evidence under oath against himself showing the alleged violation conflicts with the express prohibition of our constitution. The decision was predicated on the assumption that as the law was a valid law the defendant would by its answer ²⁷² subject itself to prosecution under it. That section of the law which required a sworn return by the accused, being easily separable from the main body of the law, does not affect the validity of the law.

"There has not been an instant of time since the passage of the law of 1889 down to the present time when such a contract as the one sued on was not illegal and void under the express terms of one or the other of these statutes.

"By what course of reasoning, then, can it be held that this contract is valid under the statute law, assuming that it is valid at common law?

"It was certainly absolutely void under the law of 1889 up to the time of its repeal by the law of 1891. Can it be successfully contended that the act of 1891 purged it of its illegality and gave it a validity which it did not have before? The plaintiff maintains that the law of 1891 should have no retroactive effect. This is not only giving it a retroactive effect, but a most unexpected one, for the very purpose of the law of 1891 is to render such contracts illegal. Had the law of 1891 been merely a repealing act and merely repealed the act of 1889, and had the parties acted under the combination thereafter, it might possibly be contended that the combination had impliedly readopted the agreement after the repeal of the act of 1889. Of course there would be some obvious objection to such a course of reasoning, but it would be worthy of consideration.

"Assuming that the contract in suit did not conflict with the principles of the common law, or with the provisions of the

law of 1889 (if such an assumption can possibly be made), yet can the plaintiff successfully contend that the contract is not illegal under the law of 1891, on the ground that so to declare it would be to give the latter law a retroactive effect? To support such a contention it is necessary to assume that the law of 1891 would be given a retroactive effect. But is this true?

²⁷³ "The contract is a continuous one. The law of 1891 is based on the valid exercise of the police power of the state. No one can have any vested right which he can claim to be exempt from the lawful exercise by the state of its police powers. Everyone holds his property rights subject to such lawful exercise. This proposition is established by an overwhelming array of authorities.

"In the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, the record showed that the people of Kansas had adopted a constitution prohibiting the manufacture and sale of beer and spirituous liquors in Kansas. The legislature passed an act enforcing this prohibition, in which it declared that breweries where beer and spirituous liquors were manufactured are public nuisances subject to condemnation in judicial proceedings. The defendants were indicted under this law. The defense contended that they had long prior to the constitution and the law been in the business of manufacturing beer; that they had large sums invested in their manufacturing plant and business, which had been invested in good faith under the guaranties of the laws then existing; that the enforcement of this law against them amounted not only to a partial, but a total confiscation of their property and property rights. This view was urged in the supreme court of the United States with an earnestness and ability hardly ever surpassed. The court in a learned and exhaustive opinion reached the conclusion that the law had been passed in the valid exercise of the police powers of the state and 'that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' and 'if the public safety and morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be restrained in providing for its discontinuance by any incidental inconvenience which individuals or corporations shall suffer.'

"The identical question which is involved in the ²⁷⁴ suit at bar was passed upon in the case of *United States v. Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007,

in which it was held that an agreement entirely similar to the one at bar was a continuing one, and though legal when made, 'the continuation of the agreement after it had been declared illegal becomes a violation of the act.' The case arose under the act of the United States relating to pools, trusts, conspiracies, etc., in restraint of trade: See, also, *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298.

"Under the construction which the referee gives to the contract in suit the defendant was to deliver on demand its proportional share (one-fifth) of the amount which the plaintiff should need from time to time in its business at the stipulated prices, and the plaintiff agreed to pay for all the crushed granite manufactured by the defendant which it should have on hand at the end of the five year contract, over and above that which should have been called for by the plaintiff.

"It was the duty of the plaintiff from time to time to demand from the defendant its proportional quota of what the plaintiff needed in its business. In case the defendant had manufactured such an amount, it would have been the duty to have delivered it to the plaintiff as demanded. Had it failed to do so, the plaintiff then would have been entitled to demand from the defendant the difference between the contract price and the market price prevailing at the time of the demand.

"In determining whether a provision similar to the one in the contract in suit is intended as liquidated damages, the intent controls, and is to be gathered from the whole instrument and the surrounding circumstances: *Tinkham v. Satori*, 44 Mo. App. 659, and cases cited.

"The referee is of the opinion that the stipulation in this contract is what the contract describes it, a 'penalty,' though the use of the word 'penalty' is by no means conclusive of the question.

275 "The plaintiff failed to show that the St. Louis Crushed Granite Company made any demand from time to time upon the defendant to deliver to it its quota of what it needed in its business. They failed to show what was said quota at various times. They failed to show what the market was at any specified time or on the day of the expiration of the contract. The plaintiffs did show that the market price of crushed granite in carload lots f. o. b. cars, Iron Mountain depot, St. Louis, during the period ranged from two dollars, the minimum, to three dollars, the maximum, and the referee does find the market value during that period did so range. But he is unable

to find from the evidence what was the market value on any particular day, or what it was on the day of the expiration of the contract. From this state of the evidence the referee cannot report what the plaintiff should be entitled to recover on the assumption that the court will disagree with his conclusions, and hold that the contract sued on is legal, and that recovery can be had upon it. The referee can make no other recommendation as to judgment on that assumption than that the plaintiff is entitled to recover a judgment for one cent damages. But the referee is of the opinion that, for the reasons herein stated, the contract sued upon is illegal and void, and that the plaintiff cannot recover at all, and recommends this court to enter up a judgment in favor of the defendant against the plaintiff."

The finding of facts by the referee is well supported by the evidence, and in his conclusion of law that the contract sued on is illegal for the reasons stated in the report, we concur; and as this will lead to an affirmance of the judgment of the circuit court, it becomes unnecessary to consider the alternative ruling of the referee on the measure of damages, upon which we express no opinion.

The judgment of the circuit court is affirmed.

All concur, except Lamm, J., not sitting.

Unlawful Trusts and Combinations are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. See, also, on monopolies and contracts in restraint of trade, the recent cases of *Monongahela River Consolidated Coal etc. Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812; *Keene Syndicate v. Wichita Gas etc. Co.*, 69 Kan. 284, 105 Am. St. Rep. 164; *Slaughter v. Thacker Coal etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, and cases cited in the cross-reference note thereto; *Swigert v. Tilden*, 121 Iowa, 650, 100 Am. St. Rep. 374, and cases cited in the cross-reference note thereto.

BRISTOW v. THACKSTON.

[187 Mo. 332, 86 S. W. 94.]

LIS PENDENS.—In Order that *Lis Pendens* may be Effective, it is essential that the litigation to which it refers result in a judgment or decree affecting the property described therein and within the issues made. (p. 481.)

LIS PENDENS—Termination.—The dismissal of an action without a trial on the merits terminates the *lis pendens*, and persons who acquire interests in the property prior to the institution

of a second suit for the same purpose are not bound by the judgment or decree therein unless made parties. (p. 481.)

LIS PENDENS—Dismissal of Suit.—The title of a pendente lite purchaser is not affected, unless the suit is brought to a successful termination against his vendor and if the action is dismissed or abandoned by the adverse party, the rights of such purchaser remain the same as if the suit had never been brought or the lis pendens notice had never been filed. (p. 482.)

LIS PENDENS—Dismissal of Action.—A voluntary abandonment or discontinuance of an action destroys the lis pendens filed therein and no subsequent suit founded upon the same cause of action, much less one seeking a different remedy for different reasons against the same land, can interfere with the title of a lis pendens purchaser or bind it by the judgment rendered in that case, unless he is made a party thereto. (p. 482.)

TRUST DEEDS—Fraud—Bona Fide Purchaser.—A purchaser of land after a trust deed thereon has been released without actual knowledge of such release through fraud or notice of any fact which would put him on inquiry, is not chargeable with such fraud, and if such release is afterward set aside without making him a party, he is not affected thereby. (pp. 483, 484.)

B. S. Head, for the appellants.

W. P. Cave, J. H. Lamotte and J. H. Hamilton, for the respondents.

³³⁶ **MARSHALL, J.** This is an action in ejectment to recover an undivided half interest in lots 22, 23 and 24, being the east forty feet of said lots, in block 19, of the original town of Moberly, in Randolph county.

The petition is in the usual form, and lays the ouster as of March 18, 1902. The answer of the defendants Thackston and Epping is a general denial, with a special plea that they are the tenants in possession ³³⁷ of John N. and S. C. Hamilton, who claim to be and whom they believe to be the owners of the land. On their own motion said John N. and S. C. Hamilton were made parties defendant, and filed an answer, which denies that the plaintiffs are entitled to the land sued for, and then pleads specially that the defendants purchased the land on May 15, 1895, from Josephine Hurt, bona fide, for a valuable consideration, and without notice of the claim of the plaintiffs; that said Josephine Hurt was the then owner of the premises in fee, and conveyed the same to them by a general warranty deed, and that they took the peaceable and undisputed possession of the premises on said date and have had the continuous possession thereof ever since. The case is here upon a certificate of the judgment, and the abstract of the record sets out that the remainder of the Hamiltons' answer is omitted, because "it consists entirely of a

second count in equity asking for an order restraining plaintiffs from bringing further suits respecting the property in controversy, was dismissed by the court below, and pertains to no question presented for decision here."

The reply is a general denial. The plaintiffs say that the court and parties treated the case in the trial court below as a case in equity. It was tried by the court, without the aid of a jury, no instructions were asked or given and the court entered a judgment upon "the issues in the action at law in ejectment for defendants and doth dismiss the second count in the answer of defendants, John N. and S. C. Hamilton, asking for equitable relief." After proper steps the plaintiffs appealed. The case made is this: J. W. Hurt died intestate, at a date not shown in the abstract of the record, seised of the following property: The east forty feet of lots 22, 23 and 24 in the town of Moberly* (the land here involved), lots 1, 2, 3, 5 and ³³⁸ 6 of H. M. Porter's addition and some personal property, not specified in the abstract of the record. He left a widow Josephine Hurt, a son, Walter Hurt, born of his marriage with said Josephine, and two children, Edward Hurt and Elizabeth Tillottson, born of his prior marriage. On May 24, 1892, the widow, Josephine duly elected to take a child's share in lieu of dower.

A short while after his death the widow and children made a voluntary partition of the property, whereby the son by the first marriage, Edward Hurt, got one-half of the land here involved, and the widow Josephine got the other half. The daughter by the first marriage, Elizabeth Tillottson, got "some notes and a small piece of property on the east side, a dwelling-house." And Walter Hurt, the son by the second marriage, "got some little thing . . . but not much."

On June 1, 1902, Walter Hurt and his then wife Eunice, the plaintiff herein, executed and delivered a quitclaim deed to his mother, Josephine, for the land here involved, and it was duly placed on record. A day or two afterward Walter became dissatisfied, and employed an attorney to bring suit. There is a conflict in the evidence as to whether it was to be a suit to set aside the voluntary partition of his father's estate, or whether it was to be a suit to set aside the quitclaim deed to his mother. The plaintiffs claim it was to be the latter. There is also a conflict in the evidence as to the consideration for the quitclaim deed from Walter and wife to Josephine. The then wife, now the plaintiff herein, says she did not know she was signing a deed, but that she understood it was simply a paper to enable

Josephine to borrow money to buy the interest of Edward Hurt and Elizabeth Tillottson, in this land. But as she could not read, and as she says she had the toothache at the time the deed was made, she could not understand exactly what the arrangement was. So that there is no substantial testimony ³³⁹ in the case to overcome the recital in the deed that the consideration was one hundred and seventy-five dollars. Nor is this feature of the case material or pertinent here, because all the parties in this case derive title partly under the said quitclaim deed of Walter and wife to Josephine.

At any rate, on June 4, 1892, Josephine caused a scrivener to prepare and she executed a note for two thousand dollars payable to Walter Hurt, and secured it by a deed of trust upon her undivided interest in the land involved in this suit, both of which she turned over to Walter. He was present when the note and deed of trust were executed, and she then declared that she did not owe Walter anything, but that in the partition of the estate, his half-brother had gotten a half interest in this land and her boy had gotten nothing, and she was afraid that after her death Edward would beat Walter out of the half interest in this land which she had gotten, and that she wanted the note and deed of trust aforesaid to be "a testamentary disposition to him," and that the deed of trust was not to be put on record until after her death. Walter took the note and deed of trust, and placed it in his wife's (the plaintiff's) hands for safekeeping, and it so remained until she caused it to be placed on record as hereinafter stated.

Sometime thereafter, Walter's wife, Eunice, brought suit against him for divorce, and on February 12, 1894, she obtained a decree of divorce from him and upon exhibiting the note and deed of trust to the court as proof of Walter's ability to pay alimony, the court allowed her five hundred dollars alimony. Said Eunice thereupon caused the deed of trust aforesaid for two thousand dollars, which Walter had intrusted to her for safekeeping, to be placed on record.

On April 16, 1894, a general execution was issued against Walter to collect the judgment for alimony.

³⁴⁰ On July 13, 1894, Josephine was summoned as garnishee and the execution returned nulla bona otherwise.

On September 17, 1894, Walter executed a deed of release of said deed of trust to Josephine. This deed of release was dated June 7, 1894, but was acknowledged on September 17th, and recorded on September 19, 1894.

Sometime in September, 1894, Josephine filed an answer as garnishee, denying that she owed Walter anything, and the plaintiff filed a reply thereto.

On February 6, 1895, the plaintiff filed an amended reply to Josephine's answer as garnishee. This reply set up, first, that Josephine was indebted to Walter in the sum of two thousand dollars, evidenced by the note of June 4, 1892, aforesaid; second, that on the same date, Josephine executed a deed of trust upon the real estate here involved to secure said note, and that it was a subsisting lien thereon for the payment of said note. The reply further set out the judgment for five hundred dollars alimony aforesaid, the summoning of Josephine as garnishee and the return of the execution nulla bona otherwise. The plaintiff then asked judgment for five hundred dollars, with interest and costs, and that it be declared a lien on said real estate and that the land be sold to satisfy the same.

On February 8, 1895, Eunice filed in the recorder's office a lis pendens, stating that there was pending in the circuit court of Randolph county, at Moberly, a suit wherein she was the plaintiff and Walter was the defendant, and Josephine was the garnishee, and which was returnable to the September term, 1894, of said court, and that the real estate liable to be affected by said suit was the land here in controversy.

On May 15, 1895, Josephine sold the property to the defendants, John N. and S. C. Hamilton, for fifteen hundred dollars cash and other property, aggregating two thousand five hundred dollars. The deed recited that it was subject to a deed of trust for one thousand dollars, and also judgment ³⁴¹ liens and taxes of record which are a lien against said property. But they were paid and deducted from the purchase price.

On September 18, 1896, the garnishment case came on for trial. Thereupon, John N. Hamilton asked to be made a party defendant, but the abstract of the record is not clear as to whether he was permitted to do so or not; the title of the case set out on page 40 of the abstract of the record seems to indicate that he was, for it speaks of him as a party defendant. Thereupon the garnishee withdrew her answer; the plaintiff dismissed "the second count in her petition"; the garnishee made default; the court heard the evidence and rendered a general judgment in favor of Eunice and against Josephine for five hundred and eighty-five dollars and costs. The abstract of the record further sets out the petition "of the plaintiff upon which the case was tried," but it is really a reply to the garnishee's answer, and

predicates a right of recovery solely upon the note for two thousand dollars made by Josephine to Walter, on June 4, 1892, and a general judgment is asked against Josephine. The abstract of the record then recites as follows: "The second count in this denial of the garnishee's answer is fully set out in the bill of exceptions, but is omitted here for the reason that plaintiff dismissed it before the trial on account of misjoinder and defect of parties, and it is not material to any issue in this case."

On January 11, 1897, Eunice caused an execution to be issued on the judgment for alimony of February 12, 1894, and had it levied on the interest of Walter in the property here involved, and at the sheriff's sale on March 12, 1897, the plaintiffs herein, Eunice Bristow (formerly Hurt) and B. S. Head, became the purchaser thereof for twenty dollars.

Sometime thereafter—the date is not given—the plaintiffs herein instituted a suit in equity against Walter and Josephine Hurt (the Hamiltons were not made ³⁴² parties thereto) to set aside the deed of release from Walter to Josephine of the two thousand dollar deed of trust, dated June 4, 1892, and on September 14, 1901, a decree was entered finding that said deed of release was fraudulently executed for the purpose of defeating the judgment of five hundred dollars, alimony, in favor of Eunice and against Walter of February 12, 1894, and setting the same aside and subrogating the plaintiffs herein to Walter's rights under said deed of trust, and ordering that the same be foreclosed, and that a special execution be issued directing the sheriff to sell the land to satisfy said judgment. At such sale on April 17, 1902, the plaintiffs herein became the purchasers of the interest of said Josephine in the land here involved for fifty dollars, and received a sheriff's deed therefor.

Then, on April 19, 1902, the plaintiffs instituted this action in ejectment to recover an undivided half interest in the land.

On September 15, 1902, this suit resulted in a judgment for the defendants on the plaintiffs' cause of action, and the Hamiltons' cross-bill was dismissed.

The abstract of the record further shows that at some time—the date is not given, but from the number of the book containing the records of judgments it would seem to have been after the judgment in the garnishment case—the plaintiffs herein instituted a suit, the nature of which is not shown, against Walter and Josephine, which resulted in a nonsuit of the plaintiffs, but from what appears it is impossible to determine what bearing that case has upon this case.

There is a conflict in the oral evidence as to the value of the land here involved. The plaintiff Head was a witness for plaintiffs, and he said that at the time of the partition inter partes, the parties estimated the property to be worth eight thousand dollars, and that the share of each of the parties therein was worth two thousand dollars, and that the note and deed of trust for two thousand dollars, given by Josephine ³⁴³ to Walter, was to represent Walter's interest in the property. On the other hand, Dennis Hogan, a witness for the plaintiff, who was in the real estate business, and who drew the note and deed of trust aforesaid, at Josephine's request, said that the property rented for forty dollars a month, when it was rented, but that it was not rented all the time, and the tenants were about three months in arrears for their rent. He also testified that Josephine said she did not owe Walter anything, but that Edward Hurt had cheated Walter out of his share of the estate in the partition inter partes, and that she was afraid that after her death he would cheat him out of the undivided half interest therein which had been allotted to her, and that she wanted said note and deed of trust to be "a testamentary disposition to him," and did not want the deed of trust recorded until after her death. He also said that the partition, inter partes, was made, and that she did not want Walter to bring suit to have it set aside and to recover his share, because of certain delicate considerations which made it undesirable that the family affairs should be aired in court, and therefore she made the said note and deed of trust to Walter to satisfy him and keep the matters out of court. And J. W. Dorser, another witness for the plaintiffs, who had been in the real estate business for thirty years, and who was Josephine's agent in the sale of the property to the Hamiltons (and not Hamilton's agent as the plaintiffs state it), said the property was worth from four thousand dollars to four thousand five hundred, and that it was not well located. He also said Josephine told him she made the note and deed of trust to Walter "for a consideration to protect her son Walter Hurt in case of her death."

The plaintiffs also claim that the Hamiltons not only had constructive notice of their claim, by virtue of the *lis pendens*, and by being privies in representation with Josephine and Walter, but also that they had actual knowledge thereof, and took with notice, and ³⁴⁴ hence are not innocent purchasers for value and without notice. This contention is partly based upon the argument that Dorser was the agent of the Hamiltons, and that he

had actual knowledge of the scheme of Walter and Josephine to defraud the plaintiffs or at any rate had such knowledge as put him upon inquiry, and, therefore, his knowledge is imputable to the Hamiltons.

There is no evidence in the abstract to support this contention. For Dorser was a witness for the plaintiffs and he expressly said, "I was the agent for Mrs. Hurt in negotiating that trade" (the trade with the Hamiltons), and there was no countervailing testimony in the case. But, on the contrary, Hamilton testified that "Mr. Dorser negotiated the trade for Mrs. Hurt, and he made the trade with us." And he further said he conducted the trade on his own behalf and for his wife S. C. Hamilton, and that he knew nothing about any of the matters herein referred to, except the *lis pendens*, until a few days after he had bought the property, when he heard something about it, and he asked Dorser about it and he told him what Mrs. Hurt had told him, and he went to see her and she said that the mortgage didn't cut any figure, "that it was only given to prevent Ed Hurt from getting all the property from Walter Hurt, her son, some way or other, I don't know exactly the term she used in explaining it, but that was the idea her words conveyed to my mind, and there was no consideration, she said, and there was nothing to show it. And she referred me to Mr. Hogan for further information regarding it. And afterward I went to see him and we talked about it, and he told me, as he testified to-day, that he fixed it up. That conversation occurred after I bought and paid for the property, not long afterward."

He further testified that before he bought he had examined the abstract and the title and knew that the deed of trust had been satisfied on the records. He also ⁸⁴⁵ said he knew of the *lis pendens*, and that there was a garnishment suit pending against Josephine Hurt, but that "I don't think that affected the property."

He also testified that he paid fifteen hundred dollars and put in two residences valued at eleven hundred dollars, for the property; that there was a one thousand dollar encumbrance on the property, and a lot of claims against it, for street paving, etc., which he paid and deducted from the purchase price.

The case therefore resolves itself into this: The deed of trust was executed on June 4, 1892. It was not put on record until February 12, 1894, when Eunice caused it to be recorded, after she got a judgment for five hundred dollars alimony, against

Walter, and it was then put on record by her without any authority from Walter and contrary to the directions of Josephine, when it was delivered to Walter, that it was not to be recorded until after her death. After Josephine was summoned as garnishee, Walter executed a deed of release of the deed of trust, and it was duly recorded on September 19, 1894. On February 8, 1895, the *lis pendens* was filed. On May 15, 1895, the Hamiltons bought the property from Josephine. On September 18, 1895, the garnishment case was tried. Hamilton asked to be made a party defendant, and it may be assumed that he was made such a party. Josephine withdrew her answer as garnishee. The plaintiffs dismissed that portion of their reply to the garnishee's answer which referred to the deed of trust and which asked that the property be charged with the lien of the deed of trust, and tried the case on the portion which related to the note, and obtained a general judgment against Josephine. Afterward Eunice caused Walter's interest in the property to be sold under the judgment for alimony and plaintiffs became the purchasers. Afterward the plaintiffs brought suit against Walter and Josephine, but did not make the Hamiltons parties thereto, and the deed of release was set aside, they were subrogated to the ³⁴⁶ rights of Walter under the deed of trust, the deed of trust was ordered foreclosed, and the plaintiffs became the purchasers at the foreclosure sale. Then this ejectment suit was brought. The Hamiltons claimed to be bona fide purchasers for value and without notice, and asked that the plaintiffs be enjoined from further proceedings against the land. The trial court entered judgment for defendants in the ejectment suit and dismissed the defendants' equitable cross-bill, and the plaintiffs appealed.

1. There is no foundation in the facts disclosed by this record for the claim that the Hamiltons had any actual knowledge of any fraud whatever, in the release by Walter Hurt of the two thousand dollar deed of trust given to Josephine, nor of any facts that would put them upon inquiry in reference thereto. So far as the case made shows, the Hamiltons were innocent purchasers for a fair price, of the land, and they are chargeable only with a knowledge of the *lis pendens*, and whatever consequences might legally ensue therefrom, and, if the plaintiffs' contention be correct, with being privies in estate with Josephine Hurt.

2. The first and chief question in this case is, What effect did the *lis pendens* have upon the Hamiltons' title?

Lis pendens is a notice of very ancient origin. It was common to both courts of law and equity even before Lord Bacon promulgated his twelve ordinances in chancery in relation thereto. Originally it was applied to real actions at common law, and it was held to be essential to the proper administration of justice, by preserving the status quo of the res pending the determination of the case: 21 Am. & Eng. Ency. of Law, 2d ed., p. 605.

³⁴⁷ But a purchaser of the property, *pendente lite*, "is affected with notice of everything set out in the pleadings and exhibits with sufficient certainty and distinctness to advise him of its bearing upon the property in litigation which is pertinent to the issues and to the relief sought, and of other material facts which means of information thus furnished, pursued with ordinary diligence and prudence, would bring to his knowledge; but not of any matters which are merely collateral, although they may incidentally appear": 21 Am. & Eng. Ency. of Law, 598.

"It is a rule to preserve the situation as it existed when the litigation was begun, in order that effect may be given to the rights ultimately established therein": 21 Am. & Eng. Ency. of Law, 602; *Herrington v. Herrington*, 27 Mo. 560; *O'Reilly v. Nicholson*, 45 Mo. 160; *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290; *Jacobs v. Smith*, 89 Mo. 673, 2 S. W. 13; *Turner v. Babb*, 60 Mo. 347.

It is essential that the litigation to which the *lis pendens* refers shall result in a judgment or decree affecting the property described therein and within the issues made: 21 Am. & Eng. Ency. of Law, 608; *Burgess v. Albert*, 44 Mo. App. 558; *Gorden v. Ritenour*, 87 Mo. 59.

"It has been generally held that the dismissal of an action or suit without a trial on the merits terminates the *lis pendens*, and persons who acquire interests in the property prior to the institution of a second action for the same purpose are not bound by the judgment or decree therein unless made parties": 21 Am. & Eng. Ency. of Law, 621.

A voluntary abandonment or discontinuance of the action destroys the *lis pendens*: *Hammond v. Paxton*, 58 Mich. 398, 25 N. W. 321; *Wortham v. Boyd*, 66 Tex. 403, 1 S. W. 109.

In *Wortham v. Boyd*, the supreme court of Texas said: "It is a general principle of equity that one who purchases pending a suit in which the title to land, or a lien upon it, is involved, does so subject to the final judgment in the cause; his title

must ³⁴⁸ abide the result of the suit, whether he be made a party or not. It shares the fate which would have befallen the title had it remained in his vendor. But the title of the lis pendens purchaser is not affected, unless the suit is brought to a successful termination against his vendor: 2 Pomeroy's Equity Jurisprudence, sec. 634. Should it be ended by a dismissal, or abandonment by the adverse party, the rights of the purchaser remain as if the suit had never been commenced. No subsequent suit founded upon the same cause of action, much less one which seeks a different remedy for different reasons against the same land, can interfere with his title or bind it by the judgment rendered in the cause, unless he is made a party thereto."

The statute of this state (Rev. Stats. 1899, sec. 4257) provides: "In any civil action, based on any equitable right, claim or lien, affecting or designed to affect real estate, the plaintiff shall file for record with the recorder of deeds of the county in which any such real estate is situated, a written notice of the pendency of the suit, stating the names of the parties, the style of the action and the term of the court to which such suit is brought, and a description of the real estate liable to be affected thereby; and the pendency of such suit shall be constructive notice to purchasers of encumbrances [held to be a misprint, and that the original bill said "purchasers or encumbrancers": *Turner v. Babb*, 60 Mo. 347]. only from the time of filing such notice."

In the light of these principles the solution of the effect of the lis pendens upon the Hamiltons' title is not difficult. The lis pendens was notice to the Hamiltons that a garnishment suit was pending in the circuit court of Randolph county by these plaintiffs against Walter Hurt, as defendant, and Josephine Hurt, as garnishee, and that the real estate here involved was liable to be affected thereby, and the pleadings in that case showed that Eunice had a judgment against Walter ³⁴⁹ for five hundred dollars, and that an execution against him had been returned nulla bona, and that Josephine had been summoned as garnishee of Walter, and had filed an answer denying any indebtedness to Walter, and that the plaintiffs' reply to that answer set up, first, that she owed Walter two thousand dollars, and a general judgment was asked against her for the amount of the judgment against Walter, and, second, that the note was secured by a deed of trust on this land, and they asked that the judgment against Josephine as garnishee be declared a lien on the land and that it be sold to satisfy the judgment.

Passing over the question whether in a garnishment proceeding under the statute a court of law could subrogate the plaintiffs to the rights of Walter under the deed of trust and decree the judgment against the garnishee to be a lien on the land, as a matter not necessary to the decision of this case, the fact appears that no such judgment was rendered in that case. On the contrary, the plaintiffs voluntarily dismissed all that portion of their reply that related to the land, and went to trial solely upon the question as to whether Josephine owed Walter anything, and the judgment rendered was a plain, personal judgment against Josephine.

The effect of this was to destroy the *lis pendens*. After the dismissal of the case as to the land, the judgment could have no more effect upon this land than upon any other land owned by Josephine. It took effect from the date of its rendition and was a statutory lien on all the land that she owned at that time. But it had no more effect upon the title of a purchaser of land from her, *pendente lite*, than an ordinary judgment in a plain action has upon land sold by the defendant pending the action and before judgment. The *lis pendens* was abandoned when the portion of the action relating to the deed of trust on the land was dismissed.

Thereafter Josephine's rights in the land, and those of the purchasers from her, were determinable ³⁵⁰ by the face of the records, unless affected or changed by direct proceedings to which she or the purchasers from her were parties.

This disposes of the question of *lis pendens* in this case.

3. The plaintiffs next contend that the Hamiltons are privies in estate with Walter and Josephine, and that as they purchased Walter's interest in the land at the sheriff's sale under execution upon the judgment for alimony and as they afterward procured a decree against Walter and Josephine setting aside the deed of release and subrogating them to Walter's rights under the deed of trust and ordering the same foreclosed, and became the purchasers at the sale, their title to the land is superior to that of the Hamiltons.

It has already been shown herein that the Hamiltons were innocent purchasers for value and without notice of any fact, circumstance or fraud, connected with any of the transactions of the Hurts or with the land, except such as they were charged with by the *lis pendens* and as were shown by the records, and that the Hamiltons were not parties to the subsequent suit to set aside the deed of release.

From this premise it logically follows that even if plaintiffs' contention be true, that the release of the deed of trust by Walter to Josephine was intended to defraud Eunice and defeat her in the collection of her judgment against Walter, it could have no effect upon the Hamiltons' title.

In order to defeat the Hamiltons' title it was essential that the Hamiltons were parties to that fraud, and without regard to where the burden of proof properly lay in that respect, there can be no doubt that the Hamiltons have completely purged themselves of any fraud or knowledge of fraud in this matter: *Jacobs v. Smith*, 89 Mo. 673, 2 S. W. 13; *National Tube Works Co. v. Ring etc. Machine* ³⁵¹ Co., 118 Mo. 365, 22 S. W. 947; *Craig v. Zimmermann*, 87 Mo. 475, 56 Am. Rep. 466; *Byrne v. Becker*, 42 Mo. 264; *Little v. Eddy*, 14 Mo. 160; *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126.

The Hamiltons were not parties to the suit to set aside the release of the deed of trust, and hence are not bound by the judgment in that case. Their title cuts back of that judgment, and is the better and the legal title so far as the records of deeds show on their face. Therefore, the plaintiffs necessarily failed in their ejectment.

This results in holding that the judgment of the circuit court, so far as it has been preserved for review by this court, is right, and it is therefore affirmed.

All concur.

The Rule of Lis Pendens is discussed generally in the recent cases of *Merrill v. Wright*, 65 Neb. 794, 101 Am. St. Rep. 645; *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145; *Steger v. Traveling Men's Bldg. Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Bergman v. Inman*, 43 Or. 456, 99 Am. St. Rep. 771. The better rule seems to be that one who purchases after the dismissal of an action, and before it is revived or a new action commenced, is not charged with the notice of *lis pendens* filed in the action previously dismissed: *Pipe v. Jordan*, 22 Colo. 392, 55 Am. St. Rep. 138; *Trenton v. Pothen*, 46 Minn. 298, 24 Am. St. Rep. 225; monographic note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 874, 875.

ROBERTSON v. BROWN.

[187 Mo. 452, 86 S. W. 187.]

PARTITION—Time of Bringing Suit for.—A suit for the partition of land brought by a devisee under a will cannot be defeated as having been prematurely commenced, by the fact that some of the heirs or devisees are minors, and the will may be contested within five years after they reach the age of majority. (p. 488.)

PARTITION—Time of Bringing Suit for.—Partition of land devised may be had before the period limited for contesting the will has expired. (p. 488.)

PARTITION—Necessary Parties—Contingency.—A phrase used in a statute requiring every person to be joined in a partition suit "who upon any contingency may be or become entitled to any beneficial interest in the premises," does not require that every person who by any future possibility may have an interest in the land, should be made a party. Such statute refers to such contingent interests as are recognized by the law as estates to take effect in future upon the happening of an uncertain event and the like, and the right to contest a will is not such contingency as is referred to in the statute. (p. 491.)

PARTITION—Necessary Parties.—A minor legatee under a will who has a right to contest its validity is not a necessary party to a partition suit by a devisee under the will. (p. 492.)

O. Hitt, for the appellants.

R. McPheeters, for the respondent.

⁴⁵⁴ MARSHALL, J. This is a suit for the partition of eighty acres, being the east one-half of the southeast quarter of section 32; one hundred and sixty acres, being the southwest quarter of section 33, subject to the right of way of the Louisiana and Missouri River Railroad; eighty acres, being the east half of the southeast quarter of section 33; and eighty acres, being the west half of the southeast quarter of section 33; ⁴⁵⁵ all in township 47, range 10, in Callaway county, Missouri. The circuit court entered a decree for the plaintiff, and the defendants, except the cestuis que trustent under two deeds of trust on the land, appealed.

The case made is this: Sometime early in the year 1896, Benjamin F. Robertson died, testate, seised of large tracts of land, of which that above described and sought here to be partitioned formed a comparatively small part. By his will, which was admitted to probate in common form in March, 1896, he devised an undivided one-half of the above-described land to his brother, John K. Robertson, the plaintiff, absolutely, and the other undivided half thereof he devised to his said brother

for life, with remainder in fee to his nephews, John W. Brown, James R. Brown, Benjamin A. Brown and George Brown, but with an express provision that his said brother should have no power to sell or encumber the half in which he had such life estate.

The bulk of his estate he left to his said four nephews, and he left a special legacy of five hundred dollars to his grandnephew, Joel Kerr Hitt. He also left certain small specific legacies to charity or to religious organizations.

The testator left no lineal descendants and no widow. He left as his legal heirs his brother, John K. Robertson, the plaintiff, and his four nephews aforesaid and his grandnephew, said Joel Kerr Hitt. His said four nephews were the children of testator's deceased sister, Jane Brown, and his said grandnephew is the only child of their sister Mary Hitt, deceased, who was the only daughter of said Jane Brown. After testator's death and before the institution of this suit, one of his four nephews, to wit, John W. Brown, died, leaving a widow, Mettie Brown, and three children, to wit, Ethel Brown, Cleveland S. Brown and Willamette ⁴⁵⁶ Brown. The widow elected to take a child's share in her husband's estate.

After testator's death the plaintiff executed two deeds of trust upon his undivided fee in the land. The estate of the testator was fully administered upon, the debts were all paid, and the administrator discharged.

The will was probated in March, 1896, and this action was begun on November 5, 1902, so that more than five years had elapsed after the probate of the will before this action was begun.

The three living nephews and the widow and children of the fourth, deceased nephew, and the beneficiaries under the two deeds of trust, were made parties defendant, and appeared and defended the suit, and they, with the exception of said beneficiaries under said deeds of trust, are the appellants herein.

Joel Kerr Hitt, the said grandnephew of the testator, is a minor, and would attain his majority in October, 1903. He was not made a party to this action, and has never appeared therein.

The petition alleges most of the facts here stated (and the agreed statement of facts and the evidence show the others), and asks that the land be partitioned and that plaintiff be adjudged one-half in fee, and a life estate in the other half, and that said four nephews and their heirs be adjudged entitled to

the remainder in fee in the other half, and that said deeds of trust be declared to be a lien on the half adjudged to the plaintiff in fee.

The answer is a general denial, with a special plea that the plaintiff and the defendants, other than the beneficiaries under the two deeds of trust, and Joel Kerr Hitt, are the legal heirs of the testator; that said Hitt is a minor and will not attain his majority until October, 1903; that plaintiff could only claim as heir except for the will; that the will was not probated until 1896, and that it may yet be contested, and therefore, this action was prematurely begun; and that said Hitt ⁴⁵⁷ has a contingent interest in the land, and, therefore, is a necessary party, and that the action cannot be maintained without he is made a party.

1. Defendants' first contention is that this action was prematurely begun.

The gist of the contention is, that under section 4622, Revised Statutes of 1899, any person interested in the probate of a will may bring an action to contest the validity thereof at any time within five years after the will is admitted to probate in common form, or after it is rejected from probate; that under section 4624, Revised Statutes of 1899, a minor or person under legal disability may bring such action within five years after the disability is removed; that said Hitt was a minor when this action was begun and would not attain his majority until October, 1903, and would be entitled to commence an action to contest the will at any time within five years after October, 1903, and, therefore, no action for a partition of the land could be maintained until after said time had elapsed.

In support of this contention defendants cite and rely upon the cases of Tapley v. McPike, 50 Mo. 589, Lamb v. Helm, 56 Mo. 432, Highes v. Burriss, 85 Mo. 660, and Stowe v. Stowe, 140 Mo. 594, 41 S. W. 951. But an examination of those cases shows that they do not support the contention, and that the point here made was not involved or adjudicated in those cases.

Tapley v. McPike, 50 Mo. 589, was an action for the value of certain slaves that had been distributed in partition. The testator had devised all of his property to his wife, but in the event she married again, she was to have only one-third absolutely, and the remainder was to go to the testator's children. She remarried, and began a partition suit against the children and the administrator, and the property, including the slaves, was partitioned, and each took possession of the share ⁴⁵⁸ al-

lotted to him. Afterward the widow died, and the children brought suit to set aside the will, and were successful. Then two of the heirs brought suit for the value of the slaves that had been allotted to the widow, and which she had sold to the defendant. The defenses were, first, that the suit was not brought within five years after the judgment in partition, and therefore the action was barred; and, second, that the heirs were estopped to maintain the action because they had accepted the fruits of the partition. As to the plea of the statute of limitations, this court held that it was not tenable, because there had been no adverse or hostile possession, and because the statute did not run against minors until they attained their majority; and because the probate of a will in common form was not final, but the will might be contested at any time within the statutory period provided therefor. And as to the estoppel it was held that the heirs did nothing to encourage the other party to do anything to his detriment, and hence they were not estopped.

But the court did not hold that a suit for partition could not be maintained until after the period limited for contesting the will had expired. On the contrary, the rationale of the decision is that partition may be had before such time expires, but that the judgment of partition and its consequences go for naught if the will is afterward successfully contested.

The only statute bearing upon the time when partition may be applied for is section 4384, Revised Statutes of 1899, which requires the court before decreeing partition to be satisfied that the estate has been finally settled and all claims against it fully discharged, or that the personal property or other real property not already partitioned, is more than sufficient to pay all claims and demands against the estate.

This statute clearly negatives the idea that no partition can be had until the time limited for contesting the will has expired, for such time might not expire ⁴⁵⁹ for over twenty years after the estate was finally administered upon and the debts all paid, if the heirs were very young at the date of the probate of the will. The courts, therefore, will not look with favor upon the tying up of estates for so long a period of time, and in the absence of express legislative restriction to that effect will not adopt such a rule.

Lamb v. Helm, 56 Mo. 432, was a direct contest over a will, with a question as to who was entitled to act as administrator pendente lite, and no question as to when partition might be had was involved or decided.

Hughes v. Burriss, 85 Mo. 660, simply decides that where a devisee under a will conveys devised property, and the will is afterward successfully contested, the title of the purchaser from the devisee fails. But that case did not involve or decide the question as to whether the land could be partitioned before the time for contesting the will had expired.

Stowe v. Stowe, 140 Mo. 594, 41 S. W. 951, was a bill in equity to set aside a will on the ground that it was obtained by fraud. It was instituted more than five years after the minor had attained his majority, and it was sought to tack the non-residence of the minor to the disability of a minor. No question as to the proper time for instituting partition proceedings was raised, involved or decided.

None of these cases support the contention that is made in this case that this action was prematurely begun. On the contrary, the better reason is in favor of allowing a partition as soon as the estate is administered upon and the debts are paid, and this is the idea conveyed by section 4384, Revised Statutes of 1899. Of course property acquired under partition proceedings before a will has been probated in solemn form or before the expiration of the time limited for contesting a will, is liable to be thereafter divested, if the will is successfully contested. The fact that this may render a title secured under a partition proceeding less certain ⁴⁰⁰ or that it will affect the price the land will bring at the partition sale, is simply an argument *ab inconvenienti*, and does not go to the right to maintain such a proceeding at such time. As this disposes of this contention it is not necessary to decide whether the defendants can plead the infancy of Joel K. Hitt.

2. Defendants' second defense is that Joel K. Hitt is a necessary party to this action. The defendants' theory is that section 4373, Revised Statutes of 1899, requires every person who has any interest in the premises, whether in possession or otherwise, to be made a party; that section 4375, Revised Statutes of 1899, requires that the petition shall describe the premises and set forth the names, rights and titles of all parties interested therein, so far as the same can be stated, including persons entitled to the reversion, remainder or inheritance, and of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises; that the minor, Joel Kerr Hitt, may yet contest the will and have it set aside, and, therefore, he has a contingent interest in the land, and, hence, is a necessary party.

On the other hand, the plaintiff contends that Hitt is represented by his uncles and their heirs, who are parties, and, therefore, he is not a necessary party.

The rights asserted by the parties to this suit arise out of the will. Hitt has no right under the will to the land here sought to be partitioned in this proceeding. The will gives the plaintiff one-half of this land absolutely, and a life estate in the other half with remainder in fee to the testator's four nephews. If there was no will or the will should be set aside, the plaintiff would be entitled to one-half of this tract absolutely. He would lose his life estate in the other half. But he would gain one-half of the balance of the estate, which is much more valuable than said life estate and ⁴⁶¹ even more valuable than this whole tract. On the other hand, if the will should be set aside these defendants would lose six-tenths of the other tracts that were devised to them by the will, and would gain only to the extent of having the life estate of the plaintiff, in the land here involved, eliminated. Under the will, Joel Kerr Hitt will get only five hundred dollars, whereas if the will is set aside he will get one-tenth of all the land.

These considerations show that it would be to the advantage of both the plaintiff and Hitt to have the will set aside, but that it would be a very serious loss to these defendants.

If the rule laid down in *Tapley v. McPike*, 50 Mo. 589, cited and relied on by the defendants, correctly states the law, the making of Hitt a party to this suit, and his acceptance of a share of the land that might be allotted to him by a judgment herein would have no effect upon his right to thereafter contest the will within the statutory period, for in that case a minor defendant was a party to the partition suit, accepted the portion allotted to him, and afterward contested the will and had it set aside, and it was held that he could recover the value of a part of the property that was allotted to the other party in the partition suit, and that he was not estopped from so doing, either because he had been a party to the partition suit, or because he had accepted an allotment under the judgment in partition.

If this is the proper rule, the making of a minor a party defendant to a partition suit is a fruitless and unnecessary proceeding. That case has never been overruled or even criticised in this state. It was cited in *Hughes v. Burriss*, 85 Mo. 666, and in *State v. Guinotte*, 156 Mo. 519, 57 S. W. 281, as authority for the proposition that a probate of a will in common

form is not final, but that it is thereafter liable to be contested within ⁴⁶² the statutory period, but the feature of that case here referred to was not noticed or discussed.

The statute is very broad, and requires every person to be made a party who has any interest in the premises to be divided, whether that interest be present, in possession, vested, in reversion, remainder, or inheritance, or who upon any contingency may be or become entitled to any beneficial interest in the premises.

The lawmakers were obviously trying to cover every kind of an estate that was known to the law. They did not, however, use the word "contingency" in the sense that every person who, by any future possibility, might have an interest in the land, should be made parties defendant. Under such a construction the grandchildren, great-grandchildren and all of the collateral kin of the testator and of the defendants, would have to be made parties. For the grandchildren or the collateral kin have an interest depending upon the death of their ancestors or of the next of kin who are parties to the action. And it is manifest that the framers of the law did not use the word "contingency" in such a comprehensive sense, but that they referred to such contingent interests as are recognized by the law as estates to take effect in future upon the happening of an uncertain event, and the like.

The right to contest a will and, if successful, to take an interest in land under the statute of descents, is not an estate in land. It is a mere privilege conferred by the statute of wills. It is in no sense a contingent interest in land, which rises to the dignity of an estate.

It is inconceivable that the lawmakers intended that every person who might contest a will should be made a party to an action for the partition of land devised by will. For what defense could such a party make to the partition proceeding? He could assert no interest. He could only say that he had a right to contest the will, ⁴⁶³ but that would not be an interest or estate in land which could be set apart to him in the partition case. In short, if Hitt was a party to this action no judgment in his favor could be rendered, and his right to afterward contest the will could not be taken away or foreclosed by any judgment that could be rendered in this case. He could not have the validity of the will litigated in this case, and therefore his right to contest the will would be the same whether he was a party to this action or not. Making him a party defendant in

this case could not estop him from contesting the will afterward.

It follows that Joel Kerr Hitt is not a necessary party to this action. This disposes of this case, for although it is argued that the railroad company that has a right of way over part of the land is a necessary party, no such issue was raised by the pleadings, and there is no evidence in the case that such is the fact. The will devises the land subject to the railroad right of way. The parties claim under the will. Whichever party is allotted the part of the land over which there may be such a right of way will take subject to that right of way, and no judgment that could be rendered in this case could have any effect upon such right of way. Hence the railroad company is not a necessary party.

The judgment of the circuit court is affirmed.

All concur.

Partition is, as a general rule, a matter of right: *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371. That partition may be had against infants, see *Freeman on Cotenancy and Partition*, sec. 467, and that it may be had by infants, see *Freeman on Cotenancy and Partition*, sec. 457; monographic note to *Nichols v. Nichols*, 67 Am. Dec. 710. In *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, it is held that one of two heirs is entitled to a partition of the estate of their ancestor while it is in course of settlement in the probate court. But heirs are not entitled to partition among themselves while the lien of the administrator for the payment of the intestate's debts remains upon the land: *Hubbard v. Ricart*, 3 Vt. 207, 23 Am. Dec. 198. Partition in connection with the distribution of the estates of decedents is considered in the monographic note to *Buckley v. Superior Court*, 41 Am. St. Rep. 140-151.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

EXCELSIOR TERRA COTTA COMPANY v. HARDE.

[181 N. Y. 11, 73 N. E. 494.]

INTEREST, When not Allowable.—Interest cannot be allowed on damages when the amount due is not ascertainable by mere computation. Hence, if the plaintiff's demand is subject to reduction because of the defective and dilatory performance of his work, and the amount of the reduction can be established only by taking evidence, his claim is not liquidated, and interest cannot be awarded to him on the amount found to be due him after making such reduction. (p. 494.)

Action to foreclose a mechanic's lien. The answer asserted a counterclaim for damages founded upon defective and dilatory performance, and the trial court allowed such claim to the extent of two thousand dollars, and directed judgment for that amount with interest. The appellate division modified the judgment by striking out the interest, and the plaintiff appealed.

Charles Coleman Miller, for the appellant.

Nathan Ottinger, for the respondents.

18 GRAY, J. I think that the reduction as to interest was right. The plaintiff's claims were, under the circumstances, unliquidated. They were, in fact, upon quantum meruit. The finding of the trial court established that the claim under the contract was subject to a reduction, because of defective and dilatory performance, to the extent of nearly one-third of its amount, while the claim for extra work was wholly disallowed. The case comes within the authority of *Delafield v. Village of Westfield*, 41 App. Div. 24, 58 N. Y. Supp. 277 (affirmed without opinion, 169 N. Y. 582, 62 N. E. 1095), where the plaintiff's claim which was in part upon contract, and in part for extra work, was reduced by an award of damages for failure in perform-

ance. The appellate division there held that as the amount when¹⁴ ascertained was subject to a reduction for damages sustained by the defendant for improper performance of the work, and the amounts due for extra work could only be ascertained by proofs, the plaintiff's claims were unliquidated, and that, therefore, interest was not recoverable. That case, as an authority, was not questioned in *Sweeny v. City of New York*, 173 N. Y. 414, 66 N. E. 101, upon which this appellant relies. On the contrary, being referred to, it was shown, in the opinion, how the two cases differed. In the case then under consideration, it was observed that the claim was not so peculiar in its character as to take it out of the general rule, and that the amount due to the plaintiff was a mere matter of computation. Referring to the Village of Westfield's case, it was pointed out that the plaintiff's claim there was subject to reduction for damages, caused by breach of contract and by improper performance, and as the defendant's setoff was unliquidated, the plaintiff's remedy was necessarily dependent upon the amount of the setoff.

While the old common-law rule has been modified, which required that a demand should be liquidated, or its amount ascertained, before interest could be allowed, the extent of its modification is that if the amount due is capable of being ascertained by mere computation, the allowance of interest is proper: See *Gray v. Central R. R. Co. of New Jersey*, 157 N. Y. 483, 52 N. E. 555.

In this case that was not possible when the contract price was subject to a reduction for damages, incapable of being ascertained as to amount, and when the claim for extra work was in dispute.

For these reasons I advise the affirmance of the judgment, with costs.

O'Brien, Bartlett, Haight and Werner, JJ., concur.

Cullen, C. J., and Vann, J., absent.

Judgment affirmed.

Interest will not be allowed, it is said, on an unliquidated claim: *Foster v. Dupre*, 5 Mart. 6, 12 Am. Dec. 466; extended note to *Selleck v. French*, 6 Am. Dec. 195. See, also, *Jackson v. Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635. But it should be allowed, though the demand is unliquidated, wherever the debtor is in default in paying money, delivering property, or rendering services pursuant to his contract, if the amount can be ascertained by an inquiry concerning the value: *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; note to *Selleck v. French*, 6 Am. Dec. 195.

POST v. MOORE.

[181 N. Y. 15, 73 N. E. 482.]

TRUSTS, PRECATORY, When not Created by a Will.—If a will purports to devise all the testator's property to his widow, to have and to hold to her and her heirs and assigns forever, but states that it is his will and desire that she shall pay the sum of three hundred dollars a year to his sister in law, Nellie Post, no trust or power in trust is created in her favor thereby. (pp. 498, 499.)

Action to have the court declare that the will of William T. Moore created a trust in favor of the plaintiff, Nellie Post. The defendant demurred to the complaint, and the demurrer was sustained by the trial court, and its judgment was affirmed on appeal to the appellate division of the supreme court for the first judicial department.

William R. Bronk, for the appellant.

Charles Edward Souther, for the respondent.

¹⁵ O'BRIEN, J. The courts below have unanimously sustained a demurrer to the complaint on the ground that it did not ¹⁶ state a cause of action. The action is plainly one to procure a judicial construction of a will and to procure a judgment that the plaintiff is entitled, under the provisions of the will, to a legacy or a charge in her favor upon the estate disposed of by the will, or to procure a judgment that the will creates a trust in her favor. It is alleged that the defendant's husband, William T. Moore, died, leaving a will which was annexed to the complaint and made a part thereof. It is alleged that the will was admitted to probate and letters testamentary issued to the defendant as executrix, and that she duly qualified.

The prayer for judgment is that the defendant be adjudged to have received all the property devised and bequeathed to her by the will in trust, and impressed with a charge to pay the plaintiff the sum of three hundred dollars per year from May 19, 1897; that the defendant may be adjudged to pay the same to this plaintiff with interest upon each yearly installment thereof of three hundred dollars for each year, from and since May 19, 1897, when the said amounts respectively became due and payable, and that the plaintiff may have judgment therefor, and that it may be further adjudged that the defendant pay plaintiff each year hereafter for and during her life the sum of

three hundred dollars, and that all said sums of money so found due and to become due the plaintiff shall be adjudged to be a charge upon all the property of every kind and nature received by the defendant from said testator by and under his said will, and that the plaintiff may have such other and further relief in the premises as may be just and equitable.

It appears upon the face of the complaint that the provisions of the will, which are at the foundation of the action, are as follows:

"Item second. I give, devise and bequeath all my property, both real and personal, in whatsoever place it may be, to my beloved wife, Katherine Elizabeth Moore, to have and to hold the same to herself, the said Katherine Elizabeth Moore, and to her heirs and assigns absolutely and forever."

¹⁷ "Item fourth. It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister in law, Miss Nellie Post."

The plaintiff claims that the fourth item of the will, quoted above, creates a trust or charge upon the estate in her favor, and that she is entitled, under the provisions of the will, to be paid three hundred dollars per year, and the purpose of the action was to procure a judgment for the moneys that she claims had accrued in her favor prior to the commencement of the action, and to secure her right to the same in the future during her life. It is manifest that unless this provision of the will secured to her the right to the payment of three hundred dollars per year from the estate, that no cause of action is stated in the complaint, and the courts below were right in sustaining the demurrer.

The learned counsel for the plaintiff, in his brief submitted to this court, contends that the plaintiff is entitled upon a proper construction of the will to the relief demanded in the complaint. In support of his contention he relies principally upon the case of *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490. In that case the effect of a similar provision in a will was the subject of discussion, and the decision was reached by a majority of the court, which, at first view, would seem to be favorable to the plaintiff's contention. It will be observed that the case of *Collister v. Fassitt* was decided by the same court that decided the case at bar. In the former case the judgment was unanimously in favor of the plaintiff, while in the present case it is unanimous in favor of the defendant, or, in other words, the two decisions are directly in opposition to each

other. Therefore, it must be that there is some sound distinction between the two cases, and that distinction was pointed out by the learned judge at special term, who decided the case at bar. He said that in the Collister case there was no direct bequest in the corresponding provision of the will to the testator's wife of all of the estate. He was perfectly correct in the statement that the will in question gave, devised ¹⁸ and bequeathed all the testator's property, both real and personal, to his wife, the defendant, to have and to hold the same to her and her heirs and assigns absolutely and forever, with the wish and desire that his wife should pay the sum of three hundred dollars a year to the plaintiff, and he held that the gift was not qualified by the provision in reference to the plaintiff, and that no trust or power in trust in favor of the plaintiff was created by the will, and he cited in support of this view the following cases: *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Clarke v. Leupp*, 88 N. Y. 228; *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144; *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; and *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291. On the authority of these cases the demurrer to the complaint has been sustained by the courts below. I think the decision was right and in accordance with settled principles of law. This case differs from *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, not only in the particulars mentioned by the learned judge at special term, but also in other respects. In the case referred to, much stress was laid upon the fact that the provision in favor of the plaintiff, who prosecuted that action, appeared first in the will, but aside from that, I think it is manifest from the language of the prevailing opinion that the case turned very largely upon facts and circumstances which appeared in the record dehors the will itself. In that case all the facts and circumstances were shown, and it seems that the court came to the conclusion that it was the intention of the testator to create a trust. At all events it was so held.

It will be seen that the cases cited by the learned court below at special term were cited in this court and fully discussed in the case of *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490. While I felt very clear that that case should have been decided the other way, I think it should be followed so far as it is supported by principle and authority. My own views were fully expressed in the minority opinion in that case, and I think they are applicable to and control the

case at bar. This case, it must be remembered, arises upon a demurrer to the complaint, which rests upon the ground that no cause of action is stated. The ¹⁹ question is therefore free from the extraneous facts which seemed to have had some influence in the decision of *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, since such facts were fully stated and discussed in the opinion. I can add nothing to the discussion of the question that is to be found in that case, except to call attention to the principles that control such questions as found in the elementary books on wills.

In *Redfield on Wills*, volume 2, page 423, second edition, the principle is stated in these words: "It is well said by Mr. Jarman that the courts, at some periods, have gone almost to an absurd length in construing the slightest intimation of a desire to have the avails, or any part of the avails of a legacy or devise appropriated in a particular manner by the devisee or legatee, into an obligatory trust for that purpose; and this learned and prudent writer suggests the propriety of always accompanying such expressions of wish or desire on the part of testators with the explicit declaration that nothing obligatory is intended. This, we think, is what is always intended by testators, in the use of these hortatory expressions in their wills toward the recipients of their bounty. There is scarcely one man in a thousand who would, in such cases, use any such indefinite and optional forms of expression toward those whom he expected to assume a binding duty and obligation to others in regard to the corpus or the income of the bequest. He uses such precatory words because he desires to leave it to the discretion of the donee, and if he intended to control that discretion, he would adopt very different language. So that, probably, in nine cases out of ten, where the courts have raised a trust out of such mere words of wish and exhortation, it has been done contrary to the expectation of the testator, and more out of regard to the moral, than the legal, duty of the donee. And we are happy to perceive in the later English cases a disposition to return to this obvious and natural construction of the words of the will, in these respects, and to leave the results of misplaced confidence, where all such consequences properly rest, with the parties concerned."

²⁰ In *Jarman on Wills* (volume 1, page 388) the principle that controls such cases is stated in these words: "And where the words of a gift expressly point to the absolute enjoyment by the donee himself, the natural construction of subsequent

precatory words is that they express the testator's belief or wish without imposing a trust."

In the case at bar there was an absolute gift by the testator of all his property to the defendant, his wife. He gave nothing to the plaintiff. He expressed a wish that his wife should pay to her three hundred dollars a year, but this was the expression of a wish only on the part of the testator, and the whole matter rested in the discretion of the wife, who took the whole property absolutely and who was appointed executrix to control and administer the estate. I think that the complaint in this case did not state a cause of action, and that the demurrer was properly sustained by the courts below. It follows that the judgment should be affirmed, with costs.

Cullen, C. J., Gray, Bartlett, Haight, Vann and Werner, JJ., concur.

Judgment affirmed.

PRECATORY TRUSTS.

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I. Scope of Note.

The early English and American authorities on the subject of "Precatory Trusts" were discussed in the monographic note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 372; hence, we shall direct our attention more particularly to the doctrine of precatory trusts as announced by the more recent authorities. We shall exclude from our consideration those cases which involve a construction of language alleged to create a trust, but not claimed to create a trust because of the precatory character of the language employed in the will, but rather on account of the language creating an implied trust. Neither shall we consider those cases which involve the creation of a trust by reference to previous verbal or other instructions to the legatee or devisee.

II. The Term "Precatory Trust" Defined and Explained.

Precatory words, as defined by Bouvier in his Law Dictionary, are expressions in a will praying or requesting that a thing be done, while, as defined by Burrill in his Law Dictionary, they are said to be words of entreaty, request, desire, wish or recommendation employed in wills as distinguished from direct and imperative words. Such words when addressed to a devisee or legatee will make him a trustee for the person in whose favor they are used, provided that the testator has pointed out with sufficient certainty both the object and subject matter of the intended trust: See monographic note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 365.

In *Bohon v. Barrett*, 79 Ky. 378, the court, in discussing the nature and meaning of precatory trusts, said: "The doctrine of precatory

trusts is well established. They grow out of words of entreaty, wish, expectation, request or recommendation frequently employed in wills. The meaning of the word 'precatory,' according to its ordinary use, does not embrace a command; it means beseeching; suppliant; prayerful. In its primal sense, as descriptive of an act relative to a right, it conveys the idea that the right is equivocal or uncertain, because it impliedly depends on the will of another, who is brought to exercise his power over it. If such power were natural or independent of the testator, then no command of his to exercise it could be enforced; but where the power or discretion is created by will, it is subject to such limitations as the testator sees proper to impose, and whatever may be the character of the words which he uses to indicate his wish or will, whether preceptive or recommendatory, they are imperative—'the wish of a testator, like the request of a sovereign, being equivalent to a command.'

"His wishes and desires as to the disposition of his property after his death constitute his will: *Bart v. Herron*, 66 Pa. St. 402. And, although such desire is not expressed in mandatory language, yet if from the language used it can be inferred, with reasonable certainty, what the desire of the testator is, it will be treated by the courts as his command and executed accordingly."

Likewise, in the well-considered case of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138, the court observed: "As to the doctrine of precatory trusts, it is quite unnecessary to trace its origin, or review the numerous judicial decisions in England and in this country which record its various applications. If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel or advice, intended only to influence and not to take away the discretion of the legatee growing out of his right to use and dispose of the property as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary."

In considering the application of the doctrine of precatory trusts, it is well to bear in mind that it is generally not necessary that technical language be employed to create a trust, and that it is enough if the intention to create a trust is apparent from the will. Hence, it follows that precatory words—that is, words of recom-

mendation, entreaty, request, wish or expectation—may be sufficient to create a trust in favor of the person or persons in whose favor they are used. The question with respect to the precatory words used being whether the precatory words are used with an intention to govern the conduct of the party to whom they are addressed or merely to indicate or suggest what he thinks would be a reasonable exercise of the discretion of the legatee or devisee in the use of the gift, but leaving it to the legatee or devisee to exercise his own discretion in the matter: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. E. 155.

The doctrine of precatory trusts seems to be founded upon the rule of construction respecting wills, that the testator's intent, when ascertained, is to be carried out by whatever words conveyed. Consequently, as we have seen before, precatory words are treated as imperative and creating a trust where both the object and subject matter of the precatory words is certain unless a clear discretion or choice to act or not to act is given, or the prior disposition of the property imports an absolute or uncontrollable beneficial ownership: *Harrison v. Harrison's Admx.*, 2 Gratt. 1, 44 Am. Dec. 365.

III. Present Tendency of Courts Respecting the Creation of Precatory Trusts.

There is considerable difference between the extent to which the earlier English and American cases went in sustaining the doctrine of precatory trusts and that which generally obtains at the present time with respect to such trusts.

Perhaps much of the confusion which exists among the authorities has been caused by the desire of the courts to follow strictly the intention of the testator in construing his will, and yet, on the other hand, not to declare the existence of a trust unless the intention to create a trust is clearly set forth.

The earlier English authorities were quite liberal in construing precatory words as creating a trust on the theory that the precatory words were a strong indication of the testator's intent as to the disposition which he willed, as a matter of fact, regardless of the courteous terms with which he expressed his will. In other words, the earlier decisions were rendered often on the tacit theory that precatory words, when addressed to near relatives or lifelong friends, were merely polite forms of couching a command.

This idea was shown to some extent in the oft-cited case of *Warner v. Bates*, 98 Mass. 274. The court in that case, in discussing the subject, said: "We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts of England and in most of the United States, that words of entreaty, recommendation or wish addressed by a testator to a devisee or legatee will make him a trustee for the person or persons in whose favor such expressions are used, provided the tes-

tator has pointed out with clearness and certainty the objects of the trust, and the subject matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by text-writers and in judicial opinions will be found to rest mainly on its applications in particular cases; and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construct words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed that the testator would do if he could control his action. But difficulties of this nature which are inherent in the subject matter can always be readily overcome by bearing in mind and rigidly applying in such cases the test that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is annexed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed; if the relations and situation of the testator and the supposed cestuis que trust are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory in the donee—the just and reasonable interpretation is, that a trust is created, which is obligatory, and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended.”

And in a recent case in California, that of *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, the court, in adverting to the evolution of the doctrine of precatory trusts, said: “It appears from the early decisions in England that any and every precatory word was laid hold of to create a trust, but the modern cases in that country and the better considered cases in America have gone the other way, and the rule in California has been laid down that the ordinary and natural import of the words used will be followed, ‘unless a clear intention to use them in another sense can be collected and that other can be ascertained’: *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; Civ. Code, sec. 1324; *Shaw v. Lawless*, 5 Clark & F. 129; *Williams v. Williams*, L. R. 2 Ch. D. 12; *Pennock’s Estate*, 20 Pa. St. 268, 59 Am. Dec. 718; *Hess v. Singler*, 114 Mass. 56. In *Story’s*

Equity Jurisprudence (vol. 2, sec. 1069), Judge Story says: 'The doctrine of thus construing expressions of recommendation, confidence, hope, wish and desire into positive peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject as a pure matter of discretion to the goodwill and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion, but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in more modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense.' "

The early English and American authorities, together with the later authorities restricting the more liberal early English doctrine on this subject, were exhaustively discussed in the monographic note to *Harrison v. Harrison's Admx.*, 44 Am. Dec. 377.

In *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132, the court, in an exhaustive opinion in which many of the more restrictive English cases were discussed, observed: "These authorities, with many others which might be cited, show the tendency of modern decisions in England not to extend this doctrine of implied trust from precatory words, but to go back as far as may be consistent with the current of their previous adjudications, to what I humbly conceive to be the true rule of interpretation—that is, to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case. Thus, the court will execute the will of the testator, and not by a forced technical construction of his words, make a will for him."

Hence, it may be said that the modern tendency is to restrict rather than to extend the doctrine of precatory trusts, although where the subject and object of the trust are clearly defined in the precatory words or clauses, the courts will construe the will as creating what is commonly called a precatory trust: *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Major v. Herndon*, 78 Ky. 123.

IV. General Requirements of Precatory Terms in Order to Create a Trust.

a. In General.—A trust has been declared to be a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the cestui que trust): *Corby v. Corby*, 85 Mo. 371. But it is not necessary to use the word "trust" or to direct property to be held in trust, since if from the language used, in view of the whole disposition of the estate, an intent and purpose may be reached which implies a trust, a trust will be implied: *Cockrill v. Armstrong*, 81 Ark. 580; *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694. Hence, the rule is stated that no particular form of expression is required to create a precatory trust. Words of recommendation, request, entreaty, wish or expectation will impose a binding duty on a devisee or legatee by way of trust provided the testator has pointed out with sufficient clearness and certainty the subject matter and the object of the trust, nor will the fact that the testator's whole estate is disposed of in absolute terms before the precatory words occur in the instrument prevent the trust from attaching: *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. See, also, *Quinn v. Shields*, 62 Iowa, 129, 49 Am. Rep. 141, 17 N. W. 437. In other words the words may be precatory in form but mandatory in effect: *Dexter v. Evans*, 63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308.

In the leading English case of *Knight v. Knight*, 8 Beav. 172, the general rule was announced in the following language: "As a general rule, it has been laid down that when property is given clearly to any person, and the same person is by the giver, who has power to command, recommended or entreated or wished to dispose of that property in favor of another, the recommendation or entreaty or wish shall be held to create a trust: First, if the words are so used that, upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

In a comparatively recent case in New Hampshire it was held that precatory words in a will equally with direct fiduciary expressions constitute a trust for the person in whose favor they are used, if from the whole transaction and the words used such a trust may be fairly implied: *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003. Likewise it has also been declared that a precatory trust is created where it is clear that on the whole it was the intent of the testator to create a trust by the use of such words, and the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the use and control of the property bequeathed or devised: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155. And in an early case in

Pennsylvania (*Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718), it was held that words in a will expressive of desire, recommendation and confidence, are not words of technical but of common parlance, and that they are not *prima facie* sufficient to convert a devise or bequest into a trust, but that such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee or the ultimate disposition to his kindness, justice or discretion.

b. Necessity for Precatory Words to Have an Imperative Meaning.—In order to create a precatory trust, the words used must be such that it will appear from them that they were intended in an imperative sense, and that both the subject and object of the recommendation or wish is certain: *McDuffie v. Montgomery*, 128 Fed. 105, citing *Cruwys v. Colman*, 9 Ves. 323; *Bland v. Bland*, 2 Cox Ch. 349; *Knight v. Knight*, 3 Beav. 179; *Flint v. Hughes*, 6 Beav. 342; *Fox v. Fox*, 27 Beav. 301; *Mills v. Newbury*, 112 Ill. 123, 54 Am. Rep. 213; *Warner v. Bates*, 98 Mass. 274. And to the effect that precatory words must be essentially imperative in their character or use in order to create a trust, see, also, *Bristol v. Austin*, 40 Conn. 438; *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694; *Bohon v. Barrett's Exr.*, 79 Ky. 378; *Young v. Egan*, 10 La. Ann. 415; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.

In the very recent case of *Burnes v. Burnes*, 137 Fed. 781, the court, in discussing the necessity for the precatory words to be used in an imperative sense, said: "There is a simple, sure and familiar form of bequest to raise a trust, which consists of a devise to the legatee in trust for the beneficiary, and a failure to use it indicates an intention to avoid the creation of a trust. Words of desire, request, recommendation or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation or confidence imperative upon the legatee, so that he shall have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made; (2) unless the subject matter of the wish or recommendation is certain; and (3) unless the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be raised. The test of the creation of the trust is the clear intention of the testator to imperatively control the conduct of the party to whom the language of the will is addressed by the expression of the wish or desire, and not to commit to his discretion the exercise of the option to comply or to refuse to comply with the wish or suggestion expressed."

But, as was said by the court in *Russell v. United States Trust Co.*, 127 Fed. 445, "An expression may be imperative in its real

meaning, although couched in language which is not imperative in form; and when it appears to have been used in this sense by the testator, the courts will give it due effect. If it is used by way of suggestion, counsel or advice, with a view to influence, but not to direct the discretion of the party, it will not raise a trust. Although a devise or bequest to one person, accompanied by words expressing a wish, entreaty or recommendation that he will apply it in whole or in part to the benefit of others, may create a trust, if the subject and object are sufficiently certain, they will not do so unless the words appear to have been intended by the testator to have been imperative; and when property is given absolutely and without reservation, a trust is not to be lightly imposed upon mere words of recommendation and confidence. These propositions are familiar in the law of recommendatory trusts, but in applying them the courts have sometimes implied and sometimes negatived the existence of a trust from the use of the same or equivalent terms, according to the light thrown on the intention of the testator by the various provisions of the will, and by such extraneous facts as have been considered material in interpreting them."

c. Necessity for Precatory Words to be Certain as to Both the Subject and Object of the Intended Trust.—As has been seen from the foregoing section, besides the necessity for the precatory language to be imperative in effect, it is also essential in order to create a precatory trust that the precatory words point out with clearness and certainty both the object of the intended trust and the subject matter upon which it is to operate: *Harper v. Phelps*, 21 Conn. 257; *Lines v. Darden*, 5 Fla. 51; *Handley v. Wrightson*, 60 Md. 198; *Hess v. Singler*, 114 Mass. 56; *Lucas v. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239; *Trustees of McIntire Poor School v. Zanesville Canal etc. Co.*, 9 Ohio, 203, 84 Am. Dec. 436; *Harrison v. Harrison's Admx.*, 2 Gratt. 1, 44 Am. Dec. 365.

The rule has, of course, been exemplified in many cases. Thus where a holographic will, after a devise of all the estate to the wife, provided: "If she find it always convenient to give my brother E. W., during his life, the interest on \$10,000 (or \$700 per annum), I wish it to be done," it was held that the provision did not refer to the choice or preference of the devisee, but to her pecuniary condition each year, and hence that the intent of the testator was to charge the annuity upon the devise to the wife, provided that the payment in any year would occasion her no inconvenience: *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411. And that a precatory trust is created by a clause in a will stating: "It is my wish and desire that my wife continue to provide for the care, comfort and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case

of her death, providing that he continue to be a dutiful child to her and shows himself worthy of consideration": *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. And where, by a will, the wife was requested to pay a niece of the testator out of the residuary estate bequeathed to the wife, so much as she shall from time to time think best for the support and benefit of the niece, it was held that the court could ascertain the amount and decree the payment of a reasonable sum for such purpose where the wife fails to honestly and fairly exercise her discretion in the matter: *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490. But it was held in *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. Rep. 575, 27 L. ed. 1089, that a devise of real estate and a bequest of personal property "to my brother S. C., to be held, used and enjoyed by him, his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend to my three beloved nieces," naming them, creates no trust, executory or otherwise.

V. Distinction Between Precatory and Discretionary Trusts.

From what has been said in the preceding part of this note, it will be observed that a precatory trust is merely a trust created by the use of precatory terms. Whether the precatory terms are sufficient to create a trust is simply a matter of construction of the precatory terms employed, in connection with the whole context of the will. The mode of carrying out the trust created by the employment of such precatory terms may be either mandatory or discretionary in the same manner as a trust created by terms other than precatory might be either mandatory or discretionary. It is of course, true that it may sometimes be difficult to determine whether the mode of carrying out a trust created by precatory terms is mandatory or discretionary, but that circumstance arises merely as a result of the employment of the recommendatory terms creating the trust, and not from any inherent quality of precatory trusts. A precatory trust, when its existence is once ascertained by the court, is enforceable in the same manner as any other trust is enforceable. It is the creation of the precatory trust itself, which must not be left to the discretion of the legatee or devisee, who is claimed to hold as a trustee and not the mode of enforcing the trust.

The principal case (*Post v. Moore*, ante, p. 495), *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, and *McCurdy's Appeal*, 124 Pa. St. 99, 10 Am. St. Rep. 575, 16 Atl. 626, illustrate to some extent the distinction above stated.

VI. Mode of Determining Whether the Precatory Terms Employed Create a Precatory Trust.

a. General Rules of Construction Applicable.

1. **Necessity for All Parts of the Will to be Considered.**—The object of a judicial interpretation of a will is to ascertain the intention of the testator according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed: *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846; *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786. Hence it follows that in the construction of precatory terms, as in the construction of any part of a will, all the provisions and parts of the will must be considered in order to ascertain whether the precatory words are used with an intent of creating a trust: *Dexter v. Evans*, 63 Conn. 58, 38 Am. St. Rep. 336, 27 Atl. 308; *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558; *Negro Chase v. Plummer*, 17 Md. 165; *Carter v. Gray*, 58 N. J. Eq. 411, 43 Atl. 711; *Wood v. Seward*, 4 Redf. Surr. 271; *Cook v. Ellington*, 6 Jones Eq. 371; *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718; *In re Boiss' Estate*, 177 Pa. St. 190, 35 Atl. 724; *Hill v. Page* (Tenn.), 36 S. W. 735. And it was held in Pennsylvania that mere precatory words, or words of command or of explanation in a will are not enough to create a trust or to establish an intention not to be gathered from a consideration of the operative words upon the face of the instrument, or, in other words, that the intent of the testator to create a trust must be apparent from the face of the will: *Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. 494. Consequently, in ascertaining whether the testator intended to create a trust, the codicil may also be considered: *Wood v. Camden Safe Deposit etc. Co.*, 44 N. J. Eq. 460, 14 Atl. 885; *In re Keleman*, 126 N. Y. 73, 26 N. E. 968; *Cook v. Ellington*, 6 Jones Eq. 371. And likewise it has been held that for the purpose of ascertaining the testator's intent the whole will must be considered, including provisions admitted to be void: *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. 880. But it is said that in the construction of wills, the law in doubtful cases leans in favor of an absolute rather than a defeasible estate, of a vested rather than a contingent one, and of a distribution as nearly in accord with the general rules of inheritance as is possible: *Patton v. Ludington*, 103 Wis. 629, 74 Am. St. Rep. 910, 79 N. W. 1078.

2. **Meaning to be Given to the Precatory Words.**—In determining whether words used in a will are used simply as a suggestion or recommendation which may be obeyed or not obeyed, or as imposing a duty upon the legatee or devisee, the precatory words are to be

understood in their natural and familiar sense: *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132; *McRee's Admr. v. Means*, 34 Ala. 349.

But, of course, the words must be construed in connection with the whole will. Thus in *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. 1032, the court said: "The true test of the effect of language at variance with other parts of the devise is, whether the intent is to give a smaller estate than the meaning of the words of the gift standing alone would import, or to impose restraints upon the estate given. The former is always lawful and effective; the latter rarely, if ever; the first, because the testator's intention is the governing consideration in the construction and carrying out of a will; the second, because even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of its essential legal attributes.

"Applying this principle to the present case, it is clear, as already said, that the testator gave a fee simple absolute to his widow, repeated and reiterated, as if he wished to put it beyond all question. But it is also clear that he still thought it necessary, or at least permissible, for him to prescribe how it should be used. Therefore he gives her all the rights and powers over it that he had while living, and in addition specifies the right to sell and convey, to make title, to use the proceeds, and lastly, as an adjunct to the will whose making he enjoins, 'the power and authority' to appoint one or two executors, as she may deem proper. It is true that the words he uses in regard to the making of her will, 'enjoin and direct,' are in their natural meaning mandatory and imperative; but coming as they do at the end, and in connection with the express enumeration of useless and superfluous powers, they indicate an intent to grant or withhold incidents of the estate already given."

b. Construction Given to Various Precatory Terms in Common Use.—The various apparently inconsistent decisions construing precatory words spring from the difference in the order of expression and the surroundings, which are seldom the same in any two cases; hence it is often said that every case must depend upon the construction of the particular word under consideration: *Bohon v. Barrett's Admr.*, 79 Ky. 378. Or, in other words, the difficulty with respect to precatory trusts is not as to what the rule is, but as to its application in the particular case on considering the whole will in that connection: *Noe v. Kern*, 93 Mo. 373, 3 Am. St. Rep. 544, 6 S. W. 239.

Hence no general rule can be laid down as to the construction of such precatory words as "wish," "desire," "recommend," "request" and the like, since the meaning to be given to such words depends entirely upon the manner in which they are used in connection with the other phraseology of the will.

In *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473, the court observed that a request made by one who has the right to direct is often, perhaps generally, interpreted as a command. So, also, it is said that express words are not necessary to create a trust by will, since, if from the language used, in view of the whole disposition of the estate, such an intention is manifest, a trust will be implied. The terms "wish and desire" may be sufficient: *Cockrill v. Armstrong*, 31 Ark. 580.

The use of the words "wish and will," and especially the word "will," were discussed quite elaborately by the court in *McRee's Admr. v. Means*, 34 Ala. 349. The court in that case said: "'Will' is sometimes used as the synonym of choice, wish, pleasure; but it is also used frequently in the sense of command, direction, determination and resolution. It has, when found in testamentary papers, a universally received mandatory signification. Swinburne's definition of a testament is 'a just sentence of our will, touching that we would have done after our death': 1 Swinburne on Wills, 4. Again, the same author says (page 19), 'the will or meaning of the testator is the queen or empress of the testament.' The same definition is also given by other authors: 10 Bacon's Abridgment, 479; Bouvier's Law Dictionary.

"In *Gilbert v. Chapin*, 19 Conn. 351, the word 'will' is used in contradistinction to precatory language, as will be seen by the following quotations: 'It is said that precatory language, or words of recommendation, are expressive of a testator's will and intention. It is true that such forms of expression declare a wish, a preference, but not a will in its appropriate sense. They express an intention, or rather a desire, not absolutely but with a qualification or condition that such desire shall nevertheless be subject to the future discretion and action of the devisee. And the distinction between this and an imperative direction, which, in legal parlance, is a will, is very intelligible and clear.' This extract indicates an opinion of the Connecticut court that 'will' is the antithesis of words of recommendation and request, not creating a trust, and carries with its use an imperative direction.

"The same meaning has also been attributed to the word in South Carolina where it is spoken of and distinguished from 'wish': *Brunson v. King*, 2 Hill Eq. (S. C.) 490. Chief Justice Marshall had the same view of the import of the word, for he said: 'The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be the declaration of a man's intentions, which he wills to be performed after its [his] death': 6

Bacon's Abridgment, 16; also 2 Blackstone's Commentaries, 499; Eels v. England, 2 Vern. 466; Forbes v. Ball, 3 Mer. 436.

"The common acceptation of the word 'will' corresponds with the meaning adopted by law-writers. There is no other word of more common and familiar use to describe the mental operation involved in the act of making a bequest of property. While the books abound in cases where words less imperative than will have been held to create trusts, we have not found, and the industry of counsel has not produced, a single case in which 'will' has not been treated as mandatory. The word 'will,' we decide, therefore, *ex vi termini* imports an obligatory direction by the testatrix." The court then held that the words "wish and will" had an imperative effect.

But in *Lines v. Darden*, 5 Fla. 51, the court, in discussing the effect of the words "will and desire" said: "The words 'will and desire' when addressed to an executor, are, as contended, imperative, and it is his duty to carry out the wishes of his testator, if possible, and when consistent with the will. The words are not necessarily addressed to the executor. The object to be performed will usually afford a safe guide in determining to whom they are addressed."

There are, however, numerous decisions in which the precatory words in common use have been construed, but such decisions can only, as a general rule, be of aid where the context is quite similar.

Thus, in *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028, the word "recommend" was construed as having been used in a strictly precatory character, with no imperative effect, while in *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 23 Atl. 501, the same word was given an imperative effect.

In *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75, it was said that under the law of England the word "request," when used in a will, may be construed to be either mandatory or directory, depending upon the intent as gathered from the whole will, and it was construed in that case as creating a trust.

And in *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. ed. 138, the court observed: "It is an error to suppose that the word 'request' necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter: *Burt v. Herron*, 66 Pa. St. (16 P. F. Smith) 400. And in such a case as

the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malim v. Keighley*, 2 Ves. Jr. 333, 529, 'the mode is only civility.' " The clause of the will under consideration in the above case was, "I give and bequeath to my wife, E. W. C., all of the estate, real and personal, of which I shall die seised, possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

The word "request" was construed in *Barry v. Sturdivant*, 53 Miss. 491; *Schmucker v. Reel*, 61 Mo. 592; *Eddy's Exr. v. Hartshorne*, 34 N. J. Eq. 419; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Wyman v. Woodbury*, 86 Hun, 277, 33 N. Y. Supp. 217; *Batchelor v. Macon*, 69 N. C. 545. And the precatory words "request and desire" in *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286; the words "requested and intrusted" in *Spurgeon v. Scheible*, 43 Ind. 216; the words "will and desire" in *Lines v. Darden*, 5 Fla. 51; *Cate v. Cranor*, 30 Ind. 292; *Reid v. Porter*, 54 Mo. 265; *Collins v. Hope*, 20 Ohio, 492; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; the words "wish and will" in *McRae v. Means*, 34 Ala. 349; the words "wish and desire" in *Phebe v. Quillin*, 21 Ark. 490; *Cockrill v. Armstrong*, 31 Ark. 580; *Cobb v. Battle*, 34 Ga. 458; *Barrett v. Marsh*, 126 Mass. 213; *Brasher v. Marsh*, 15 Ohio St. 103; the words "desire and request" in *Kauffman v. Griess*, 141 Cal. 295, 74 Pac. 846; the words "enjoin and direct" in *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. 1032; the words "on the trust and confidence" in *People v. Powers*, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502.

Although the word "wish" is a distinctly precatory term, still it very often is used in an imperative sense. The court, in *Russell v. United States Trust Co.*, 127 Fed. 445, in construing the word "wish" said: "The present case differs primarily from either of these cases, because the testator did not 'request' or 'direct' his wife, in referring to the future disposition of the property left to her. But this consideration is of little importance. Undoubtedly the word 'wish' may be equivalent to 'will' or 'request' or 'direct,' if the context justifies that meaning: *Bliven v. Seymour*, 88 N. Y. 469. In *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 739, 19 N. E. 411, it was given that meaning. But in both of these cases the context authorized the implication that it was used imperatively. So, also, the word 'wish' may be equivalent to 'request'; but the meaning of the word 'request,' standing alone, is indeterminate and depends altogether upon the context: *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572. Except that in this case, as in all of those

cited, the testator used a word which may be regarded as imperative or as not imperative, these authorities do not assist the present decision. The testator's expression of a 'wish and expectation' that his wife should 'generously remember' his brother's children and 'such others as she may choose' when she should make her will is one of hope and confidence rather than of command. That he did not intend to use it in an imperative sense appears from the context, and the provision for the mother denotes the distinction which existed in his mind between words of command and words of recommendation. When he proposes to provide for his mother he 'requests his wife to pay to her or her caretaker an ascertainable sum—'such sum or sums as may be requisite for her every comfort.' This part of the clause may very properly be read as imperative. But when he refers to the persons mentioned in the latter part of the clause, he substitutes for the word 'request' the words 'my wish and expectation'—words which are calculated to appeal to her judgment rather than to coerce it. More significant, as indicating that he did not intend by these words to dictate the action of his wife, is the circumstance that he applies them alike to the children of the deceased brother and to 'such others as she may choose.' If the will had read, 'I request [or direct] my wife by her will to generously remember my deceased brother's children and such others as she may choose,' the wide latitude of discretion given to her would be quite inconsistent with an intention to dictate or command. As it does read, the language is more clearly indicative merely of suggestion and preference. It falls short of denoting any definite disposing intention in favor of the persons mentioned."

For instances where the word "wish" was construed as having been used in a mandatory sense, see *Phebe v. Quillin*, 21 Ark. 490; *Bohon v. Barrett's Exr.*, 79 Ky. 378; *Curd v. Field*, 103 Ky. 293, 45 S. W. 92; *Pratt v. Trustees etc.*, 88 Md. 610, 42 Atl. 51; *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57; *Cook v. Ellington*, 6 Jones Eq. 371; *Brasher v. Marsh*, 15 Ohio St. 103; *Appeal of Fox*, 99 Pa. St. 282; *In re Gaston's Estate*, 188 Pa. St. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

And for instances where the word "wish" was construed as having been used in a precatory sense, see *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244; *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165, 39 Am. Rep. 741; *Brunson v. King*, 2 Hill Eq. (S. C.) 483.

The words "wish," "desire," "command" or "direct" are said to be apt words in a will to show the intent of the testator to make a will: *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. 282. But of course the expression of a "desire" that the one to whom a bequest is made shall make a certain testamentary disposition of part of the bequest may fall short of a "command or direction," and have merely a precatory effect: *Estate of Marti*, 132 Cal.

666, 61 Pac. 964, 64 Pac. 1071. But the word "desire" is frequently used in a will with the intent of indicating a positive direction: See *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203; *Wood v. Camden etc. Co.*, 44 N. J. Eq. 460, 14 Atl. 885; *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57; *Appeal of Philadelphia*, 112 Pa. St. 470, 4 Atl. 4; *Oyster v. Knull*, 137 Pa. St. 448, 21 Am. St. Rep. 890, 20 Atl. 624. And likewise the word "desire" has been used in many instances for the purpose of creating a trust: See *Cockrill v. Armstrong*, 31 Ark. 580; *Major v. Herndon*, 78 Ky. 123; *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 331, 5 Atl. 471; *Van Dyck v. Van Beuren*, 1 Caines, 84; *Riker v. Leo*, 115 N. Y. 93, 21 N. E. 719.

The term "requiring" was construed as creating a trust in *Curd v. Field*, 103 Ky. 293, 45 S. W. 92.

c. **Effect of Precatory Words Indicating Merely Motive of Testator in Making the Gift.**—No trust can be implied merely from words indicating the motive which induced the testator in making the gift: *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. 780; *Small v. Field*, 102 Mo. 105, 14 S. W. 815. The application of the rule just stated arises in those cases where a devise is made to one standing in the relation of a parent, and makes some recommendation or request touching the maintenance of children, since such a recommendation or request relates, as a general rule, to the motive of the testator: *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Seamonds v. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. 156.

d. **Effect of Precatory Words as Courteous Command When Addressed to Near Relatives or Intimate Friends.**—Undoubtedly, very often a testator, in formulating an imperative direction in a will, employs courteous precatory terms from a sense of delicacy when addressing such directions toward his wife or some near relative, but in such cases the context will generally show that an imperative direction was intended. It is quite likely that the doctrine of precatory trusts originally arose through an extensive use of such courteous forms of commands.

The Kentucky court, in *Bohon v. Barrett's Exr.*, 79 Ky. 378, in construing certain courteous language of a precatory character to amount to a trust, adverted to the reasons for the use of such language. That chivalrous court observed: "The language employed in defining the discretion of his brother is somewhat obscure and indirect, resulting from an attempt by the testator to maintain through his language a refined respect for his feelings, amounting almost to sentimentalism. A peculiar and sacred confidence must be presumed to have existed between them."

And in referring to the absence of specific directions the court said: "It requires no romantic stretch of the imagination to account for the use of general terms and the nonexpression of the particulars

of the delicate confidence of brothers, born of the same mother, reared around the same fireside, and in manhood associated under the same roof until one is taken and the other left.

“And in view of their relations and the peculiar language of the will, which exalt this trust high above the usually guarded trusts, the slightest wish of the testator should be binding upon the conscience of his brother.”

And in *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786, the court, in construing the effect of the words “wish and desire,” said: “In considering this question it is to be remembered that the devisee is the wife of the testator, between whom it is not expected that commands would be expressed in such forcible language as between strangers: *Warner v. Bates*, 98 Mass. 274; *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.”

Likewise in *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028, the court adverted to the fact that the word “recommend,” when used toward a wife, might have a more binding force than when used toward an executor.

But in *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465, the court, in adverting to the use of precatory language toward a wife tending to limit the estate devised, said: “Nor is it doubted that it was within the power of the testator to place such a limitation upon the apparent devise in fee simple as to charge it with a trust in favor of another than the immediate devisee. Neither is it questioned that such a limitation might have been made in words not so full of harsh command, when addressed to his wife, as would seem neither rude nor inconsiderate if addressed to an executor or another not sustaining a relationship so near and sacred as that of wife. But we do not understand that language addressed to the wife, in form and substance advisory, will be construed as a command, simply because the relationship not only admits of, but would seem to suggest, words of tenderness and civility, when such construction would radically qualify other and clearly expressed purposes of the testator, and set at naught any of the other well-recognized canons of construction.

“In addition to the admitted rules of construction above stated, there is one fully settled in this state, that a devise in fee, clearly and distinctly made, cannot be taken away, cut down or modified by subsequent words not clearly and distinctly manifesting the testator’s intention to limit such devise: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 32 L. R. A. 298, 42 N. E. 277, 44 N. E. 17; *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *O’Boyle v. Thomas*, 116 Ind. 242, 19 N. E. 112; *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159.”

e. **Effect of Precatory Words Addressed to an Executor.**—In an early case in New Hampshire, that of *Erickson v. Willard*, 1 N. H. 217, the court observed: “The words ‘desire,’ ‘request,’ ‘recommend,’ ‘hope,’ ‘not doubting’ that the executor will conduct in a

specified manner, when they come from a testator who has the power to command, are to be construed as commands clothed merely in the language of civility, and they impose on the executor a duty which courts have in repeated instances enforced." And see, also, *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397, where the distinction as to the use of precatory terms addressed to a devisee and when addressed toward an executor is also recognized. And in *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, the court, in discussing the effect of the word "desire" addressed toward the wife, who was named as his devisee, observed that "while the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms."

f. **Effect of Precatory Words as Mere Suggestion to Influence Discretion.**—As we have seen before, words indicating merely a wish or recommendation, and appealing to the discretion of a legatee, impose no legal obligation on him in favor of the person in whose behalf the words are used: *Wilde v. Smith*, 2 Dem. Sur. 93. Likewise a clause in a will stating that the testator would like his estate kept in a certain place, and as it was at his death, is held not to impose any duty: *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278.

g. **Effect of Precatory Words as Dependent upon Status or Education of Testator.**—It would seem that it would be a circumstance to aid in the construction of a will that the will was a holographic one drawn by a testator unfamiliar with the meaning of the language employed by him, or, on the other hand, that the will was drawn by a lawyer who was familiar with the meaning of the language employed in the framing of the will.

This idea was considered of some weight in *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 23 Atl. 501. In that case the court observed: "In the first place, the additional circumstances are to be noted that the will is a holograph, by a Frenchman who is plainly deficient in orthography and ability to properly punctuate his sentences and use capital letters, although his production, in many respects, exhibits intelligence and considerable thought, and also that, in the portion of the will which is offered for construction, he has plainly interlined immediately after the word 'instrument' at the end of the provision for the increase of the legacy to the Presbyterian Church, these words, 'and her Plaisure if she My Wife feel dispose to do so but it is not obligatory,' following which, without intervening punctuation, are the words, 'Also to increase the donation,' etc., the word 'also' commencing with a capital 'A.' Upon a close inspection of the original will with the aid of a magnifying glass, I am satisfied that a long downward stroke, by way of punctuation, originally followed the word 'instrument,' but that when the interlineation was made it was written over in such a way as to make

it run into, or constitute part of, the letter 'b' in the word 'obligatory.' '' And in referring to certain words used by the testator in the precatory clauses of the will, the court further observed: "It is to be remembered that Vinot was born and reared in France, and that the English language was consequently not his native tongue. Many indications of his proneness to adopt his native language, a fact significant of his lack of familiarity with English, appear in his will. Under the circumstances we must not too readily assume that he meant to use the Saxon word 'gift' in its exact sense."

And in *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028, the will was a holographic one. The court, in construing the precatory clauses of the will, seemed to place some weight upon the fact that the testator was a lawyer and understood fully what language was necessary to vest a trust estate.

And in *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468, the court adverted to the fact that the testator was a lawyer, but it does not appear whether the will was holographic.

h. Effect of Varied Use of Precatory Words in Different Parts of a Will.—As has been stated before, the whole context of the will is to be considered in construing the effect of the various precatory terms employed in the will.

The general rule as to the construction of precatory words was stated by the court in *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633, in construing the word "desire." The court said: "The rule that words occurring more than once in a will shall be presumed to be used always in the same sense unless a contrary intention appear by the context, or unless the words be applied to a different subject, laid down by Mr. Jarman (3 Jarman on Wills (R. & T.), 707), is founded on reason, and is in accord with the fundamental rule which requires us to seek from the language of a will the intent of the testator. There is nothing in the context to indicate that 'desire' was used in paragraph 3 in a different sense from that clearly indicated by its use in paragraph 4 and paragraph 7. In every case the word is applied to the same subject matter, that is, the disposition of parts of testator's estate. It follows, in my judgment, that 'desire' in paragraph 3 bears the sense of 'I direct,' as it evidently does in paragraphs 4 and 7."

Likewise in *Russell v. United States Trust Co.*, 136 Fed. 758, the court placed considerable weight upon the fact that different phraseology was used in different parts of the will. It said: "Where the whole instrument is considered, it is apparent that the testator has chosen different forms of expression for different objects, and it is fair to assume that his choice was intelligent. To his wife and daughter he wills and bequeaths two-thirds and one-third, respectively, of his real and personal property. When he is providing for the support of his mother and sister—an obligation to be im-

mediately assumed—he, with full confidence, requests. When he refers to generous remembrance of the children of his brothers and others, such remembrance to find expression at some time in the future, which may be remote, he says, ‘it is my wish and expectation.’ Why did he change the form of expression? Why did he not with full confidence request that such remembrance be made? ‘Wish and expectation’ import hope, and ‘hope’ presupposes the possibility of disappointment. If the change of language was made with an intelligent purpose, it would seem that such purpose contemplated that over the wished-for remembrance of the nephews the sound discretion of the wife was to be more fully exercised than over the provision for the support of mother and sister. It may be that a disclosure of all the surrounding circumstances might induce a court to construe the words ‘wish and expectation’ as complainant contends they should be, but with nothing but the will before us, they cannot be given such meaning.’”

1. Effect Where Meaning of Precatory Words is Doubtful.—If there is doubt whether a testator intended by words of advice or recommendation to narrow an otherwise free and unfettered devise or bequest, the courts incline in favor of the absolute title of the devisee or legatee: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298. See, also, *Barrett v. Marsh*, 126 Mass. 213, to the same effect.

j. Effect Where Precatory Words Follow an Absolute Bequest or Devise.—It is stated that a devise in fee, clearly and distinctly made, cannot be taken away, cut down or modified by subsequent words not clearly and distinctly manifesting the testator’s intention to limit such devise: *Mitchell v. Mitchell*, 143 Ind. 133, 42 N. E. 465; *Second Reformed etc. Church v. Disbrow*, 52 Pa. St. 219.

And with respect to the use of precatory words or clauses immediately following an absolute disposition, the rule seems to be that the precatory words, under such circumstances, do not create a trust: *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *First Presbyterian Church v. McKallor*, 35 App. Div. 98, 54 N. Y. Supp. 740.

This rule was followed in the principal case (*Post v. Moore*, ante, p. 495), where it was held if a will purports to devise all the testator’s property to his widow, to have and to hold to her and her heirs and assigns forever, but states that it is testator’s will and desire that she shall pay the sum of three hundred dollars a year to his sister in law, no trust or power in trust is created in favor of the sister in law thereby.

So, also, it is said that where full discretion is clearly given to the legatee, the use of precatory words will not create a trust: *Corby v. Corby*, 85 Mo. 371. Hence the rule has also been stated that al-

though expressions of a desire or a wish of the testator as to a specific disposition of his property, standing alone by themselves, may create a valid devise or bequest, still the rule is different where such expressions are employed after an absolute disposition of the property has been made: *Hopkins v. Glunt*, 111 Pa. St. 287, 2 Atl. 183.

The case of *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846, was an instance where a wife devised land to her husband in fee simple with an expression of "desire" and "request" that he should convey it to a Masonic lodge "in such manner and at such times as he may deem best," was held not to import a trust on behalf of the lodge.

And where a will, which after disposing of the residuary estate to the husband "absolutely" expresses a wish that he shall arrange his affairs so at his death "whatever may remain" of his property will go to the son of the testatrix, it was held not to create a precatory trust: *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244.

And where a will bequeathed a certain sum to two women as their absolute property, followed by a provision, "I request said Susan and Lucy to use said fund thus given to further what is called to Woman's Rights Cause. But neither of them is under any legal responsibility to anyone or any court to do so," it was held that no trust was created: *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473.

And likewise it was held that no trust was created where the estate was given to two youngest sons in fee simple, with a clause stating that "In making this disposition of my property I assume that my oldest son will understand and appreciate my reason for giving whatever property I may have had at my disposal to his younger brothers; and that they, on their part, will not fail to do for him and his family, all that, under the circumstances, the truest fraternal regard may require them to do": *Rose v. Porter*, 141 Mass. 309, 5 N. E. 641.

So, also, where it is apparent from the language of a will that it was the testator's intention to vest a fee in his daughters as to certain real estate, this intention is not to be controlled by the expression of a wish that the husbands of his daughters should not control the inheritance: *Ringe v. Kellner*, 99 Pa. St. 460. And where a father, by a clause in his will, gives his daughter ten thousand dollars and by another clause states that it is his "wish and desire" that she shall not consume the principal, but that at her death it shall go to certain devisees, it was held that the precatory clause did not limit the absolute gift to one for life only: *In re Heck's Estate*, 170 Pa. St. 232, 32 Atl. 413. And where a will gave the residuary estate to the wife "absolutely," with a request that she give to their son a certain sum or any sum she might think best, and also accompanied by a clause providing "I further request that she, my said wife, shall assist any of my brothers and sisters if they should be in need, and at her decease she should divide her property among them as

she may think best," the court held that the precatory clauses created no trust in favor of the brothers and sisters: *McDuffie v. Montgomery*, 128 Fed. 105.

But it was held in a Missouri case that a precatory trust may be attached to property devised to another absolutely, provided that the intention to so change it appears from the will: *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. And in an early case in Mississippi it was stated that though the language of a will may make an absolute gift, yet if other appropriate expressions be used which show with sufficient certainty that but a qualified gift was intended, a court of equity will look to the clear intent of the testator and raise a constructive trust where none had been expressly declared, but it also laid great stress upon the point that to raise a precatory trust the words of recommendation or of hope used by the testator must be certain both with respect to the object and subject of the intended trust: *Lucas v. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766. And in this connection see, also, *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718.

And in *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155, the will contained a clause stating, "I give, devise and bequeath unto my wife M., her heirs and assigns, forever, all my real and personal estate, . . . having full confidence in my said wife, and hereby request that at her death, she will divide equally, share and share alike, in equal portions, as tenants in common between my sons and daughters [naming them] all the proceeds of my said property, real and personal, goods and chattels hereby bequeathed." The court, after an elaborate discussion of the subject, held that the widow obtained under the will a life estate coupled with a trust as to the remainder in favor of the children.

k. Effect Where Testator Declares that No Trust is Created by the Precatory Terms Used.—The rule seems to be that however strange the precatory language may be, that the courts will not construe it to create a precatory trust where the testator expressly declares that his precatory language is not intended to create a trust: *Ender's Exr. v. Tar Co.*, 89 Ky. 17, 11 S. W. 818; *Wood v. Seward*, 4 Redf. Sur. 271; *In re Havens*, 6 Dem. Sur. 456; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541; *Toms v. Owen*, 52 Fed. 417; *Burnes v. Burnes*, 137 Fed. 781.

VII. Construction of Precatory Clauses Relative to Persons Occupying Various Relations Toward the Testator.

a. In General.—Inasmuch as the decisions construing particular precatory terms and clauses are of controlling weight only when there is a striking similarity of the terms or clauses construed, and inasmuch as there may be a certain amount of similarity in all cases wherein the precatory terms or clauses were employed in behalf of persons occupying a similar state of relationship toward the testator,

we have grouped the cases with respect to their reference to the persons upon whose behalf the terms or clauses were used.

b. **Parents.**—A clause in a will stating that “my mother is to have \$150 out of my estate annually as long as she lives and that she remain with my wife during the remainder of her life,” imposes no charge upon testator’s estate for the board of his mother: *Martin v. Goode*, 111 N. C. 288, 32 Am. St. Rep. 799, 16 S. E. 232. But if there is expressed a “wish and desire” in the will of a deceased wife that her aged, infirm and dependent father should, in case of need, be provided with a home and maintenance by her husband, the intention of the testatrix to provide for the maintenance of her father is apparent, and it must be held that the devise to the husband was made on the trust that he would furnish to the father during the latter’s life should he need or require it: *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003.

c. **Children and Grandchildren.**

1. **Children.**

A. **Precatory Terms Creating a Trust.**—Where a will bequeathes an estate to three sons, but a clause states that having full confidence in such sons and their disposition to deal fairly, justly and liberally, testator leaves it to them to make proper and suitable provision for their sisters, it shows an intention on the part of testator to charge the estate on behalf of the sisters: *Cockrill v. Armstrong*, 31 Ark. 580. A devise to the wife “that she may dispose of the same as she may think best for herself and my children,” and “to have and use as she may think best and proper for herself and my children,” creates in the devisee for the benefit of herself and the children: *Elliott v. Elliott*, 117 Md. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Kidder’s Exr. v. Kidder* (N. J. Ch.), 56 Atl. 154. Likewise under a devise to a wife of all real and personal estate to do as she thinks best for the children, and in case she remarries, then she is to have a child’s portion, it was held that the widow was a trustee for herself and the children: *Walker v. Quigg*, 6 Watts, 87, 31 Am. Dec. 452. And under a devise to a wife of all the estate “to be managed by her, and that she may be enabled the better to control and manage our children, to be disposed of by her to them in that manner she may think best for their good and for her happiness,” the wife holds the property in trust, not for herself or the children alone, but for both to be managed at her discretion for the benefit of herself and the children: *Young v. Young*, 68 N. C. 309. A residuary clause in a will stating “all the remainder of my estate I leave to my wife Elizabeth to be divided among my children as she thinks proper,” vests no beneficial interest in the wife, but only a trust for the benefit of the children: *Green v. Collins*, 28 N. C. 139.

The decisions above set forth providing for the maintenance of children are not strictly precatory clauses, and are more properly

questions as to whether they constituted an express trust, but they will serve as comparisons with those decisions in which the language is more precatory in its nature.

A trust is created where a testator devises certain land to his wife in trust for the use of his two sons, the portion to one son being defined by specified boundary lines and the other son to have the residue, but declaring that in the division of the land it was his wish to equalize them as near as possible, and "I trust to the sense of justice to my said sons that if I have given more to the one than the other that they will do right": *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342. And a bequest to a wife, her heirs and assigns forever, "having full confidence in my said wife and hereby request that at her death she will divide equally between my sons and daughters all the proceeds of my said property, real and personal, hereby bequeathed," gives the widow a life estate with remainder in trust for the children: *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155.

B. Precatory Terms not Creating a Trust.—Some of the bequests and devises in which the welfare of the children is provided for are not strictly precatory clauses, but inasmuch as they are sometimes discussed from that standpoint, we will advert to them. Thus a bequest to a wife "during her lifetime for the support of herself and my children" was held not to create a precatory trust: *Billar v. Loundes*, 2 Dem. Sur. 590. So, also, a bequest to a wife "in full confidence that she, in her wisdom, will make every needful provision for my children," creates no trust: *Buffum v. Town of Tiverton*, 16 R. L. 643, 19 Atl. 112, 7 L. R. A. 386. Neither will a clause stating, "I devise all my estate to my beloved wife feeling entire confidence that she will use it judiciously for the benefit of herself and our children," create any trust: *Lesesne v. Witte*, 5 S. C. 450. And likewise a clause stating, "I desire that the land and other property remaining shall continue in the possession of my wife L. during her life, believing she will make use of it for the benefit of our children as well as her own comfort. At her death I wish the property sold and an equal division made," was held not to create a trust: *McCreary v. Burns*, 17 S. C. 45. And a will giving property to the wife, "having the fullest confidence in her capacity, judgment, discretion and affection to properly bring up, educate and provide for our children and to manage and dispose of my said property in the best manner for their interests and her own," creates no trust: *Hunt v. Hunt*, 11 Nev. 442. So, also, a bequest to the wife of real and personal estate "in her own right in fee simple" with a clause stating, "I only make this request of her and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz., that in the event she should marry again, she will see that the interests of our children in said property are pro-

tested," was held not to create a trust in favor of the children: *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468. And where a will gave to the children of the testatrix an absolute estate in lands, share and share alike, and then expressed a desire that the children should live together and use the income of the property only for ten years, it was held that no trust was created by the precatory clause: *Clark v. Clark*, 99 Md. 356, 58 Atl. 24.

A bequest to a wife "to her own use and benefit as she shall deem best for herself and our beloved daughter" creates no trust in favor of the daughter: *Bulfer v. Willigrod*, 71 Iowa, 620, 33 N. W. 136. And a clause stating, "I lend to my wife, during her life, all my negroes, for the purpose of raising and educating my two sons," then giving in appropriate terms the remainder of his estate to his wife as guardian of his sons, was held not to create a trust in behalf of the sons with respect to the negroes: *Mason v. Sadler*, 59 N. C. 148. A clause in a will stating, "All the balance of my estate . . . I direct be and remain in the possession of my wife and children for their support and the education of my children, and as my children shall arrive at age or marry, I desire that my wife shall advance to such child or children such an amount . . . as she deems prudent, but not exceeding a distributive share of my estate, as it is my intention for my said wife to keep as much of my estate as will make her comfortable during her widowhood; but should she marry again, then she is to have no part of my estate," was held to create no trust: *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. 902. And no trust was created where a testator devised his residuary estate to his wife and stated it was given to her to the end that she might provide a home where she could receive the children, and that he was confident that it would be equally divided among all of them when she no longer needed it: *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449. So, also, an absolute devise in fee of certain land to testator's wife followed by a clause stating, "It is my request and wish that she will . . . make such provisions by will or otherwise . . . that my son W. may share equally of the estate . . . willed to her, with my other children," was held to create no trust in favor of the son: *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465. And where testator devised certain land to his son declaring that it was his earnest request that such son, if he should die without issue, should give the land or its value to testator's daughter, W., if living, and, if not, to her children, it was held insufficient to raise a trust: *White v. Irvine*, 24 Ky. Law Rep. 2458, 74 S. W. 247. And so, also, where testator devised land to his son absolutely, a subsequent clause requiring all of his children, if any should die without issue, at their death, to will the property received from his estate to testator's surviving children, or the issue of those dead, it was held not to raise a precatory trust: *Igo v. Irvine*, 24 Ky. Law Rep. 1165, 70 S. W. 836.

A bequest of unimproved land, which was of little benefit without the power of disposition, to the wife "in her own name and for her own purposes, with only the condition that" at her death she "make an equal division of her estate to such children as shall survive her, or their representatives," was held not to create a trust: *Sears v. Cunningham*, 122 Mass. 538. And no trust was created where the residuary estate, real and personal, was devised to the wife "to have and to hold the same to her, her heirs and assigns forever," with a request that she should devise the property to his children: *Street v. Gordon*, 41 App. Div. 439, 58 N. Y. Supp. 860. And a devise of "all the rest and residue of my property to my dear wife believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death," creates no trust: *Cheston v. Cheston*, 89 Md. 465, 43 Atl. 768. And where a will provided, "After the payment of my just debts, I give, devise and bequeath all my estate, real and personal, to my wife A., to her and her heirs, forever, recommending to her to give the same to my children at such time and in such manner as she should think best," it was held that the widow took an absolute estate in fee simple: *Gilbert v. Chapin*, 19 Conn. 342. So, also, where the testator willed to his wife his real estate "during her natural life," and his "personal estate of every description absolutely, having full confidence that she will leave the surplus to be divided, at her decease, justly, among my children," it was held that the absolute ownership of the personal property of the testator was given to the widow with an expression of mere expectation that she will use and dispose of it discreetly as a mother: *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718. And a will which, after disposing of the residuary estate to the husband, "absolutely," expresses a wish that he shall arrange his affairs, that at his death "whatever may remain" of his property will go to the son of the testatrix, does not create a trust: *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244. And a bequest to two sons "assuming" that they will do for another son and his family "all that the truest fraternal regard may require," creates no trust: *Rose v. Porter*, 141 Mass. 309, 5 N. E. 641. So, also, where a bequest to an eldest daughter "to dispose of as she may deem best for my daughters," naming certain younger daughters, it was held that the eldest daughter took an absolute estate in fee simple: *Hughes v. Fitzgerald* (Conn.), 60 Atl. 694. And a bequest to each of four adult children with the residue to the widow, "requesting her that she will so dispose of the property at her death as to make my youngest son S. an equal legatee with the balance of my children, was also held to create no precatory trust: *Speairs v. Ligon*, 59 Fed. 233. A devise of all testator's property to his son who had taken care of him for several years, and reciting that it was made principally in consideration of such services, but expressing a wish that the son would do what was right by his brothers and sisters with respect to the residue, if any re-

maintained after a just compensation for such services, was held to create no trust in the absence of fraud: *Whitesel v. Whitesel*, 23 Gratt. 904.

A devise to grandchildren in fee, but "admonished" and "charged" that the gift was made "in the hope and upon the trust that they will provide for their parents during their lives," was held to create no trust: *Arnold v. Arnold*, 41 S. C. 291, 19 S. E. 670.

2. *Step and Adopted Children.*—A will directing the income of an estate to be paid to the husband during life, "in the full confidence that he will, as he has heretofore done, continue to give and afford my children (by a former marriage) such protection, comfort and support as they or either of them may stand in need of" creates no trust: *Warner v. Bates*, 98 Mass. 274.

But a precatory trust is created by a clause in a will stating, "It is my wish and desire that my wife continue to provide for the care, comfort and education of T. J. M., now aged nearly five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child to her, and shows himself worthy of such consideration": *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786.

3. *Grandchildren.*—Where a testator by one clause gave the residue of his estate to his daughter and "to her heirs and assigns forever," and in a subsequent clause stated "I commit my granddaughter to the charge and guardianship of my daughter S. L. C., in whose honesty, goodwill and integrity I repose the utmost confidence. I enjoin upon her to make such provision for said grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate," it was held that the daughter took an absolute title to the residuary estate, and that the provision for the granddaughter was left wholly to the discretion of the daughter: *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144. But it was held where a testatrix devises all her estate to her son with a provision that out of his inheritance he "is desired by his mother" to pay, as soon as possible, five hundred dollars to his grandniece because of the kindness bestowed upon testatrix by the grandfather of said grandniece, that grandniece was entitled to the gift: *In re Copeland*, 38 Misc. Rep. 402, 77 N. Y. Supp. 931.

But where a will provided, "I give and bequeath all my property, real and personal, to my beloved wife, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good," it was held to create no trust: *Foose v. Whitman*, 82 N. Y. 405, 37 Am. Rep. 572. And where a bequest was made to three daughters of certain personal property to be equally divided, with a request for them to bequeath such articles to his grandchildren, the request creates no trust: *In*

re Whelen's Estate, 175 Pa. St. 23, 34 Atl. 329. So, also, where a clause gave an estate to a daughter during her natural life, and at her death directed the same to be equally divided among her children, and by another clause expressed his "will and desire" to be that should either of the grandsons arrive at twenty-one, or granddaughters marry previous to the death of the daughter, that they should receive a portion of the estate as a loan, to have the management and receive the benefit of the same until the final distribution, and then return the same for division, it was held that it created no trust in favor of the grandchildren: *Lines v. Darden*, 5 Fla. 51. And likewise a devise of a farm to a son and daughter equally, "to them, their heirs and assigns forever, hoping and believing they will do justice hereafter to my grandson D., to the amount of one-half of the said homestead farm" was held to create no trust in favor of the grandson: *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397.

d. **Brothers and Sisters.**—A trust is created by a devise of "all the rest and residue of my estate, both real and personal, to my two brothers, A. and B., whom I appoint my executors, with full confidence that they will settle my estate according to my will, and that they will dispose of such residue among our brothers and sisters and their children as they shall judge shall be most in need of the same": *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86. Likewise a trust is created in favor of a brother by a clause in the will stating that, "having and reposing implicit confidence in the goodness and kindness of my dear wife, I rely on her to make all needful provisions for the future wants of my brother": *Blanchard v. Chapman*, 22 Ill. App. 341.

But a provision in a will requesting the sole legatee to give to the sisters of the testatrix "any presents she may need and that my estate can afford" is too indefinite and uncertain to create a trust in favor of the sister: *Webster v. Wathen*, 97 Ky. 318, 30 S. W. 663. And a residuary devise to the son, "his heirs, and assigns forever, to his and their own use," subject to a charge for the support of wife and the sister of testator, with a clause signifying a "desire and hope" that he would "so provide by will or otherwise that in case he shall die leaving no lawful heirs living" such residue "shall go in equal shares" to certain named relations of the testator, including brothers, sisters and cousins, was held to create no trust in favor of the relations: *Hess v. Singler*, 114 Mass. 56. And a clause stating, "I hereby will and bequeath unto my beloved wife A. my whole estate, real and personal, after the payment of my just debts, recommending to her at the same time to make some small allowance at her convenience to each of my brothers and sisters, say to each one thousand dollars," does not create a trust in favor of such brothers and sisters: *Ellis v. Ellis' Admr.*, 15 Ala. 296, 50 Am. Dec. 132.

A clause stating "it is my wish that such property as my wife may have remaining undisposed of at her death that she should previously

will the same to her sister, and to my brothers and sisters in equal proportions, leaving it entirely with her to make such disposition of her property by will as her judgment shall dictate, merely expressing my desire in the premises; and should she prefer to retain or dispose of the property so conveyed and devised to her, in a manner different from my wishes as herein expressed, she is at full liberty to do so, without having her right or motives for so doing called in question," does not create a trust: *Toms v. Owen*, 52 Fed. 417. So, also, where a will gave the residuary estate to the wife "absolutely," followed by a clause stating, "I further request that she, my said wife, shall assist any of my brothers or sisters if they should be in need, and at her decease she should divide her property among them as she may think best," it was held that no trust was created in favor of the brothers and sisters: *McDuffie v. Montgomery*, 128 Fed. 105.

e. **Nephews and Nieces.**—A trust is created by a clause stating, "I give, devise and bequeath unto my husband all my real and personal estate absolutely. . . . I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate": *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. And a clause stating, "I desire that the said J. W. should, at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding fifty dollars a year, to the support of the widow of M. E.," my sister's daughter, coupled with other expressions, was held to create a trust: *Erickson v. Willard*, 1 N. H. 217. The case of *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527, was also an instance of a trust for the maintenance of a sister and niece.

But where the testator devised his whole estate to his wife, and requested that if she should not require the whole of the estate as a support, she should will the remainder at her death to the children of testator's brother, it was held that no precatory trust was created: *Bryan v. Milby* (Del.), 24 Atl. 333.

And no trust is created by a clause stating, "And it is my wish and expectation that when my wife J. shall make her will disposing of the property left her by me that she will generously remember the children of my deceased brother W. and such others as she may choose: *Russell v. United States Trust Co.*, 127 Fed. 445. The case of *In re Whitcomb's Estate*, 86 Cal. 265, 24 Pac. 1024, which will be mentioned under subdivision VIII, referred, in addition to a request for a disposition to a college, to a disposition in favor of a grandnephew

f. Other Relatives by Blood or Affinity.

1. "Relations," "Near Relatives," "Blood Relations" and "Kinsfolk."—No trust was held to be created by a will which, after giving the estate to the wife for life, recited that after providing for her own wants and comforts she should, in her discretion, "give

to such of my relations such aid or assistance as my wife may, of her own will, think proper and just": *Corby v. Corby*, 85 Mo. 371.

But a trust was held to be created where the testator gave the residue of his estate to the wife "in good faith, believing that she will make a will and thereby distribute so much of the last-named legacy among my near relatives as she may not use for comfortable maintenance; and it is my will that my said wife shall make such distribution": *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794. Though a trust is not created by a clause stating, "I expect and desire that my said wife will not dispose of any of said estate by will in such a way that the whole that might remain at her death shall go out of my family and blood relation": *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439.

A provision in a holographic will stating, "I have spoken of all my property to be divided in this will . . . without making any outside bequests. I want to give to my wife an executrix's power to give out of my estate, before division, as much as fifteen thousand dollars of bequests to my kinsfolk: Say to W. five thousand dollars or ten thousand dollars, in her discretion, and the balance to some one else who may be in need," was held to create a trust to the extent of five thousand dollars: *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288.

2. **Brothers and Sisters in Law.**—A bequest to a wife of ten thousand dollars, "which I desire her to use for the benefit of her brothers and sister, according to her best judgment and discretion, which is to be paid after the discharge of the debts," was held to create no trust: *Jacob v. Macon*, 20 La. Ann. 162.

The principal case (*Post v. Moore*, ante, p. 495), as we have seen before, also had a clause relating to a sister in law, which was held to create no trust.

In *Tom v. Owen*, 52 Fed. 417, the husband had conveyed all his property to his wife, merely reserving a life estate. Subsequently, he made a will stating that he wished to avoid all questions that might arise about the previous deed. He devised all the estate to her, and provided that his wife "should make free use of all the property so conveyed and devised to her for her own use, or for charitable purposes, knowing, that in case any of my immediate relations, or her sister, should, by any misfortune, or otherwise, need any assistance, she would generously share with them, and therefore I feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein," the court held that no trust was created.

3. **Poor or Needy Relations.**—In some of the clauses which we have adverted to, it will be observed that the bequest was made with a request that provision be made for such of the testator's relatives, sometimes naming the particular degree of relationship, as should be in need, or require assistance and similar phrases. For instance of

such phrases, see *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86; *Blanchard v. Chapman*, 22 Ill. App. 341; *Webster v. Wathen*, 97 Ky. 318, 30 S. W. 668; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *Willets v. Willets*, 35 Hun, 401; *Tom v. Owen*, 52 Fed. 417; *McDuffie v. Montgomery*, 128 Fed. 105.

g. Servants and Strangers.—Where a will, after giving the estate to the wife, provided: “It is my desire that it may suit her pleasure, and if so, I request, but without intending to create a trust therefor, that she allow and pay Ann Tarco, a mulatto, who has been for some time in our service, fifteen dollars per month for life, for her support.” The will also provided that in case the wife did not survive him, he gave the estate to an adopted daughter, charged with the payment of fifteen dollars to said mulatto. The wife survived him. And it was held that no precatory trust was created: *Ender’s Exr. v. Tarco*, 89 Ky. 17, 11 S. W. 818.

But in *Chambers v. Davis*, Phil. Eq. (62 N. C.) 152, 93 Am. Dec. 605, a trust was held to have been created where the testator recommended in his will a certain person to the humanity of his executors, and also in the will specified a sum to be set apart, the interest of which was to be for the support of the person so recommended, who was a slave, during his life.

VIII. Construction of Precatory Terms Relative to Charitable, Religious, Educational, or Other Public Uses.

A bequest to executors “in their own right, trusting, nevertheless, and believing that, under a proper sense of their obligation to their own consciences, and their accountability to God, they will pay over and contribute the same to charitable objects,” creates no trust: *Frierson v. General Assembly of Presbyterian Churches*, 7 Heisk. 683. So, also, a statement that testator relies upon the legatee to dispose of money for the benefit of such charitable and benevolent and educational purposes as legatee shall judge will most promote the comfort and improve the condition of the poor, or of testator’s descendants, if they become poor and needy, creates no trust: *Willets v. Willets*, 35 Hun, 401.

The case of *In re Ingersoll*, 59 Hun, 571, 14 N. Y. Supp. 22, was an instance of a bequest to an executor for church purposes, the testator stating what he desired, but the court held that no trust was created. And in *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510, the precatory clause construed also had a recommendation respecting an increase of a fund toward a church, though the case seems to have been fought on other lines.

And where a will provided, “I give to my nephew . . . and to his son all my interest, either real, personal or mixed, in the Juneno Ranch. . . . And I recommend to my said nephew to leave his portion thereof after his own death, and the death of his wife” to his son and his children, or descendants, and, in default of such, to Harvard College, the court held that no trust was created in favor

of the college: In *re Whitcomb's Estate*, 86 Cal. 265, 24 Pac. 1028. In the case of *Succession of Hutchinson*, 112 La. 656, 36 South. 639, the bequest was to a university for the sole benefit of its medical department. The will contained numerous recommendations, but they were held not to amount to conditions. A somewhat similar bequest was made in *Pratt v. Trustees*, 88 Md. 610, 42 Atl. 51, where the residuary estate was given to an insane asylum. One clause of the will stated that, while testator did not wish to alter the management of the asylum, it was his "wish and will" that the estate given be used to complete the present buildings, etc. The court held that no trust was created.

A bequest to a city "with the request that the same be expended, if such is sanctioned by law, in the erection of a drinking fountain in the city," does not create a precatory trust: In *re Crane's Will*, 159 N. Y. 557, 54 N. E. 1089. So, also, where, in making a bequest for the erection of a soldiers' and sailors' monument, the testator stated that his "desire" was that it should be erected on a particular triangular piece of ground in the town, it was held that the desire was not imperative: In *re Ogden*, 25 R. I. 373, 55 Atl. 933.

A bequest of a certain sum to two legatees "as their absolute property," followed by clause "I request said [legatees] to use said fund thus given to further what is called the 'Woman's Rights Cause'; but neither of them is under any legal responsibility to anyone, or any court, to do so," creates no trust: *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473.

And a bequest to a publication society of a church organization, charging the society with the duty of using the gift in counteracting "the unscriptural, unreasonable and pernicious doctrine of the immortality of the soul" was held not to create a trust: *Pierce v. Phelps*, 75 Conn. 88, 52 Atl. 612.

BRADY v. SMITH.

[181 N. Y. 178, 73 N. E. 963.]

MINES AND MINERALS, Reservation of, When does not Include Limestone.—A conveyance "excepting and reserving therefrom all mines and minerals which may be found on the above piece of land, with the right of entry at any time with workmen and others to dig and carry away the same" does not except from its operation ledges of limestone rising above the natural surface of the earth, and visible when the deed was made, nor give the grantee the right to conduct open quarrying for the purpose of taking possession of such limestone. (p. 536.)

Charles S. Mereness, for the appellant.

A. E. Kilby, for the respondent.

¹⁷⁹ BARTLETT, J. This action, in form, is a partition suit, but by consent was tried for the purpose of settling the rights of all the parties claiming a title or interest in the land or the limestone bed located thereon and the right to work the bed by open quarrying. This action was tried by Justice William S. Andrews, who wrote an opinion which was adopted by the appellate division. The long and complicated chain of title involved in this case is set forth in the opinion of the learned trial judge, and need not be stated here in detail.

On or about February 18, 1852, one John La Farge, who was the owner of a hundred acres of land in Diana, Lewis county, conveyed the same by warranty deed to Margaret Lewis, with the following reservation: "Excepting and reserving ¹⁸⁰ therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away."

The will of John La Farge was admitted to probate in 1858, and by it he gave and devised to his wife, who has since died, during the term of her natural life, a one-third part of his real estate, and bequeathed all the rest and residue of his property to his children. By a deed recorded August 6, 1898, certain of the descendants of La Farge, who obtained title under this will, conveyed to the defendant, Louise J. Smith, their right, title and interest in an undivided four thirty-fifths share of the mineral rights upon twenty acres of said premises; and she in turn later made an agreement with the defendant, John J. Sullivan, permitting the latter to enter upon the property and dig for and carry away the minerals found thereon.

The trial judge states in his opinion as follows: "The twenty acres in question are largely covered with limestone or granite ledges rising above the natural surface of the ground. There is, it is true, some timber and some tillable land, but probably the chief value of the property consists in this stone. To obtain this material a quarry has been opened.

"The plaintiff claims that she and her sisters, subject to their mother's right of dower, are the owners of this limestone or granite bed, and that she and her mother each own an undivided half of the remainder of the premises, and that she is entitled to a decree of partition in this action. She also states that the other

defendants claim some interest in the property, and she now asks to have the rights of all the parties fixed and determined. With this end in view, and upon the consent of all the parties, an order was made bringing in certain defendants not originally sued.

"The defendants Sullivan and Smith, in their answer, claim that the rights to the granite or limestone quarry were reserved in the deed from La Farge to Lewis; that Smith is a tenant¹⁸¹ in common with the heirs of La Farge not parties to this action, and that, as such tenant in common, she had a right to give Sullivan the authority to remove the material.

"Rebecca Phelps claims that under the infancy proceedings and the contract she is the equitable owner and is entitled to receive a conveyance of the entire property, subject to the Phelps and Carpenter lease, upon paying the balance of the purchase price.

"The defendants, Carpenter and Phelps, the Oswegatchie Quarry Company and the Metropolitan Marble Company, claim that under the lease made by Mary Brady they are rightfully entitled to possession of the land and the quarry for a period of fifty years from the date of the lease. As a matter of fact, the defendant Sullivan seems to be in actual possession of the quarry."

The trial judge thereupon states at length certain conclusions which he had reached by reason of the facts stated. Among other conclusions the trial court held, and the judgment appealed from adjudges, that the defendant Louise J. Smith is the owner of four thirty-fifths of the limestone bed on the twenty and four one-hundredth acres, and that the defendant John J. Sullivan, by virtue of the agreement made by him with the defendant Smith, has the right to take and remove the limestone in question by means known as open quarrying; that the land may be sold subject to such rights. It is from this portion of the judgment that the appeal was taken to the appellate division, which resulted in an affirmance of the judgment of the trial term.

We are of opinion that the construction placed upon the exception and reservation in question cannot be sustained.

The case of *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186, is relied upon by both parties, to some extent, on this appeal. The case cited involved the construction of a deed which conveyed "All the mineral and ores (on the same premises), with the right to mine and remove the same; also the right to sink shafts and sufficient

surface to erect suitable buildings for machinery and other buildings necessary and ¹⁸² usual in mining and raising ores; also the right of ingress and egress for mining purposes, and to make explorations for minerals and ores, saving reservations to the state of New York."

The question involved in that case was whether a bed of granite, overlaid by soil from four to six feet deep on land that was thickly wooded, could be removed by open quarrying. Andrews, C. J., reviewing the English and American cases, reached the conclusion that under the form of conveyance already quoted open quarrying was not permissible. The learned judge said: "Upon the authorities we think we should not be justified in holding that granite was not embraced in the reservation or grant of 'mineral' in the absence of qualification. . . . But the words do not stand alone, but are connected with the context, which clearly indicates, in our judgment, that the parties had in view only such minerals as are to be got by mining in the ordinary sense of that term; that is, by underground and not by open workings."

The only question decided was that the provisions of the deed in question read together contemplated only underground mining and not open workings. The suggestion as to the possible construction of a reservation or grant of "minerals," in the absence of qualifying words so as to embrace granite, was purely obiter.

The question presented in the case at bar is whether the exception and reservation in question is broad enough to include a bed of limestone and the open quarrying of the same. So far as we are advised the question presented is open in this court. It may be well enough to quote once more the reservation to be construed: "Excepting and reserving therefrom unto the parties of the first part, their heirs and assigns forever, all mines and minerals which may be found on the above piece of land, with the right of entering at any time with workmen and others to dig and carry the same away."

The first point to be observed is that the word "minerals," as used in this reservation, is coupled with "mines" by the ¹⁸³ conjunctive—"all mines and minerals." This shows that the grantor had in mind the reservation of mines and their contents, to wit, "minerals." This is further emphasized by the word "found"—"which may be found on the above piece of land." It appears in the findings that immense boulders and ledges of limestone crop out on the surface of these premises, and it would be a

strained and unnatural construction to assume that the language commented upon above refers to stone lying open to the view, and that the same may be removed by open quarrying and blasting, destructive of the surface, under the reservation of "All mines and minerals which may be found." We have here qualifying words quite as persuasive and controlling as those that influenced the court in *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 49 Am. St. Rep. 683, 42 N. E. 186.

The reservation of John La Farge must be read as referring to minerals in mines found, with the right to enter at any time with workmen and others to dig and carry the same away; that is, dug out of the earth by means of mines and mining: *Darvill v. Roper*, 3 Drew. 294. The word "dig" has a technical meaning, when the context is considered, and does not apply to open quarrying and blasting.

It is true, under scientific definition, the world of matter is divided into three general subdivisions—animal, vegetable and mineral. It is equally true that in the ordinary phraseology of mankind a mineral is a word limited largely to metallic substances.

It is quite impossible to harmonize all that has been written on this subject in the cases and text-books. In construing reservations and grants it is necessary, if possible, to ascertain the intention of the parties. In many of the English cases, where acts of parliament were involved, the decision went off on the language employed in the various acts. There are a number of well-considered cases which involve substantially the question here presented.

In *Countess of Listowel v. Gibbings*, 9 Ir. C. L. Rep. 223, under a reservation of "all mines and minerals," it was held that limestone was not included in the reservation. The ¹⁸⁴ learned judge writing in that case said: "I do not deny that, if it appeared clearly to be the intention of the parties, to be collected from the instrument, that limestone quarries should pass by the words 'mines and minerals,' they might pass; but words are to be understood in their natural and usual meaning, unless there be a clear indication that they are, in a particular case, intended to have a more or less extended signification. Usually, 'mine' imports a cavern or subterraneous place, containing metals or minerals, and not a quarry; and 'minerals' mean ordinarily metallic fossil bodies, and not limestone."

In *Brown v. Chadwick*, 7 Ir. C. L. Rep. 101, under a reservation of "all mines, minerals and other royalties whatsoever,"

it was held not to include open limestone quarries. The learned court said at page 108: "The distinction between a mine and a quarry appears to me to be this—a mine is a place where the substratum is excavated, but the surface is unbroken; whereas in a quarry the surface is opened, and the material, in the present case limestone, is exposed and raised."

In *Darvill v. Roper*, 3 Drew. 294, under a reservation of "mines of lead and clay and other mines and minerals," it was held that limestone was not included within the reservation; it was further held that minerals meant substances of a mineral character, which could only be worked by means of mines, as distinguished from quarries. The learned court pointed out in this case that if the scientific definition of the word "minerals" was applied it would mean "every portion of the soil, not merely the limestone rock, but the gravel, the pebbles, all, even to the very substance of the loam or mold which forms the soil, would be included." The court also rejected the second meaning, often attributed to the word "minerals" as a metalliferous substance, for the reason that it was not broad enough to meet the questions presented in conveyances and leases. The court then uses the following language: "There is then a third sense in which the word 'minerals' may be used, viz., all such substances as are dug out¹⁸⁵ of the earth by means of a mine, a meaning which without being opposed to the other senses, is in accordance with the derivation and etymology of the word; for whatever may be the origin of the word 'mine,' minerals is clearly derived from mines. A mineral is etymologically, properly a substance dug out of the earth by means of a mine."

It is thus apparent that each case must be decided upon the language of the grant or reservation, the surrounding circumstances and the intention of the grantor if it can be ascertained. The adoption of arbitrary definitions in reference to mineral substances buried in the earth is not permissible. The word "mineral" standing by itself might, under a broad, general, popular definition, embrace the soil and all that is to be found beneath its surface; under a strict definition it might be limited to metallic substances, and under a definition coupling it with mines it covers all substances taken out of the bowels of the earth by the process of mining.

We are of opinion that under the exception and reservation in question John La Farge did not reserve the right to himself, his heirs and assigns forever to the limestone on the

premises conveyed and to conduct open quarrying for the purpose of taking possession thereof.

The judgment of the appellate division should be reversed and the judgment of the trial court so modified as to conform to the views expressed in this opinion, and as modified affirmed, with costs to the plaintiff in appellate division and in this court. If parties cannot agree on form of modified judgment same can be settled before Bartlett, J., on notice.

Cullen, C. J., Gray, O'Brien, Haight, Vann and Werner, JJ., concur.

Judgment accordingly.

Grants of Land Reserving the Minerals are discussed in the note to Lillibridge v. Lackawanna Coal Co., 24 Am. St. Rep. 554-557. See, too, Armstrong v. Lake Champlain Granite Co., 147 N. Y. 495, 49 Am. St. Rep. 683, and cases cited in the cross-reference note thereto. A vein of pure white quartz sand, valuable for making glass, or other special use, is within a reservation of the "minerals" in a deed Hendler v. Lehigh Valley R. R. Co., 209 Pa. St. 256, 103 Am. St. Rep. 1005. See, too, Murray v. Allred, 100 Tenn. 100, 66 Am. St. Rep. 740.

HUTCHINS v. PENNSYLVANIA RAILROAD COMPANY.

[181 N. Y. 186, 73 N. E. 972.]

PRACTICE.—Where the Defendant Moves that a Verdict be Directed in His Favor, and the court, on the contrary, directs a verdict in favor of the plaintiff, neither party asking to go to the jury on any question, the effect is the same as if both parties had moved to direct, and neither had asked to go to the jury, and the appellate court will examine the record to see whether there is any evidence which, upon any reasonable view, will sustain the verdict, and if there is, the judgment will be affirmed, otherwise it will be reversed. (p. 540.)

RAILWAYS—Conditions on Ticket, When not Deemed Accepted by the Passenger.—If a ticket, with coupons attached, has printed on it a sentence to the effect that the purchaser agrees to the conditions of the contract, with a blank for his signature, and one for the signature of the selling agent as a witness, but there is no signing by the purchaser, nor any reading or other knowledge of the conditions, he is not deemed to have had notice of, nor to have assented to, conditions expressed in fine print on such ticket. (pp. 540, 541.)

RAILWAYS—Assent to Terms of Ticket.—There is No Presumption that a Passenger Assents to the terms of a complex ticket unless he has notice of what they are. (p. 541.)

RAILWAYS—Baggage, Liability for, When Lost on a Connecting Line, Limiting by Notice on the Ticket.—If a passenger inquires

for through transportation from one designated point to another, over a specified line, whose agent thereupon hands to her what is called a continuous passage through ticket, and receives the price asked therefor, and gives her a check on such ticket for her trunk to the designated place of destination, and the ticket contains on its lower part, in very fine print, eight paragraphs, the first of which declares that in selling the ticket and checking the baggage, the company acts as agent only, and is not responsible beyond its own line, and the last of which limits liability for baggage to one hundred dollars, the purchaser is not deemed to have assented to, and is not bound by, such conditions, where she does not read them, and is in no way notified nor given knowledge of them, and may recover for such baggage, though lost on the line of the connecting carrier. (p. 541.)

Action to recover for baggage. Judgment in the trial court was entered in favor of the plaintiff upon a verdict directed by the court. The defendant moved for a new trial, which was denied. On appeal, the appellate division of the supreme court in the second judicial department affirmed the judgment, and the defendant appealed.

Henry Galbraith Ward and Norman B. Beecher, for the appellant.

Maurice V. Theall, for the respondent.

¹⁸⁷ VANN, J. In May, 1900, the plaintiff applied to an agent of the defendant for through transportation from Brooklyn, New York, to Carlsbad, New Mexico, "over the Pennsylvania Railroad." The agent handed her what is called "a continuous passage through ticket," and she paid him the ¹⁸⁸ price asked therefor. At the same time the defendant gave her a check "on that ticket" for her trunk to Carlsbad, New Mexico, but when the trunk was delivered at that place the lock was broken and a portion of the contents was missing.

At the head of the ticket was printed in somewhat conspicuous type, "Pennsylvania Railroad Company. Good for one first-class passage to" Fort Worth, Texas. Beneath and in smaller letters were the words "Subject to the following contract," which were directly followed by a "Notice" to the effect that it was "a penal offense for the purchaser or holder of this ticket to sell, barter or transfer the same for a consideration in the state of Texas, and this ticket or any unused part thereof is redeemable at any ticket-office in Texas, of a railway company over which this ticket or any unused part thereof reads, if presented within ten days after the right to use the same has expired by limitation of time as stipulated thereon." Next below in very fine print were eight paragraphs, numbered consecutively, of which the first and last were as follows:

"1. That in selling this ticket and checking baggage this company acts as agent only and is not responsible beyond its own line

"8. That baggage liability is limited to wearing apparel not exceeding one hundred dollars in value." At the bottom of the ticket was the following: "I hereby agree to all the conditions of the above contract" and beneath were two blanks, one headed "Signature," and the other, "Witness." Attached to the ticket were five coupons, each headed in conspicuous type "Issued by Pennsylvania Railroad Co.," which in all except the last was followed by the words, in much smaller type, "on account of," some other railroad named.

Another ticket with two coupons attached for a passage from Fort Worth to Carlsbad was delivered to the plaintiff with the one already described. The second ticket was in all other respects a substantial duplicate of the first, and the coupons accompanying were in the same form as the others, except that each named, in fine print, a different railroad.

Neither ticket was signed by the plaintiff and she was not ¹⁸⁹ asked to sign either. She read neither ticket nor any coupon, and never even took them from her purse where she put them as they were delivered to her, except when the conductor asked for her fare. Her attention was not "called to what the ticket contained" and she "did not know what it contained." She was never informed by what means or lines the defendant was to furnish the transportation that she asked for, nor how it intended to perform its contract with her. She knew what she wanted and asked for it, but the defendant gave her something of its own manufacture, without notifying her what it was or that it was not what it knew she supposed she was purchasing.

During her journey she changed cars at St. Louis, where she took the train pointed out to her by the conductor, which, as she thought when she testified as a witness, was on the Iron Mountain railroad. It did not appear that she was accustomed to traveling or that she knew anything about the nature of coupon tickets or what roads belonged to the defendant's system. She was somewhat advanced in years and simply asked for a through ticket to Carlsbad, New Mexico, over the Pennsylvania railroad, paid the price and took what was given her.

In behalf of the defendant evidence was given by men in its employment tending to show that it accounted to seven independent railroad corporations named in as many coupons attached to the tickets for their share of the entire cost of trans-

portation, and that the plaintiff's trunk was delivered in good order at St. Louis to the Iron Mountain and Southern Railway Company, one of such roads. Where her trunk was broken open did not appear.

At the close of all the evidence the defendant moved for the direction of a verdict in its favor, but the court directed a verdict in favor of the plaintiff, neither party having asked to go to the jury upon any question. The effect was the same as if both parties had moved to direct and neither had asked to go to the jury. The exception to this direction is the only one appearing in the record.

¹⁸⁰ If any question of fact was presented by the evidence, it was resolved in favor of the plaintiff by the course pursued at the trial without objection on the part of the defendant: *Sutter v. Vanderveer*, 122 N. Y. 652, 25 N. E. 907; *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38. We should, therefore, examine the record in order to see whether there is any evidence which, upon any reasonable view, will sustain the verdict directed and if there is it is our duty to affirm; otherwise to reverse: *Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 57 N. E. 485.

I think the evidence warranted the court in finding, by the direction of a verdict for the plaintiff, that the contract was for through transportation from the point of departure to the place of destination. The defendant failed to conclusively establish a limitation by special contract of its common-law liability as a carrier: *Jennings v. Grand Trunk Ry.*, 127 N. Y. 438, 28 N. E. 394. The form of the ticket suggests a proposition to make such a contract, for there was appended thereto the sentence, "I hereby agree to all the conditions of the above contract," with a blank for the signature of the purchaser and another for the signature of the selling agent as a witness. The proposition was not accepted by the plaintiff, for she did not sign the ticket nor have any reason to believe she was expected to. She did not assent to the proposition nor agree to any limitation of liability on the part of the defendant, by merely accepting and using the ticket, for she did not read it or know its contents, nor was she told to read it or requested to sign it. She asked for through transportation to Carlsbad, New Mexico, over the defendant's railroad, and when the ticket was delivered to her without request or remark by its agent, she had a right to presume she was getting what she asked for and what she paid for. A railroad ticket may be a contract or a voucher, and which the ticket of the plaintiff was depended upon the inference to be drawn from what was said and done

when she bought it, as well as on the form of the ticket and coupons. A ticket is no notice of conditions concealed therein by fine print, unless the attention of the holder is in some way directed to them. There is no presumption that a ¹⁹¹ passenger assents to the terms of a complex ticket, unless he has notice of what they are: *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Madam v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153.

The situation of the plaintiff was quite unlike that of Mr. Cullom, the purchaser of a ticket in the Talcott case, as he was an old traveler and familiar with all the facts. He "knew what a coupon ticket meant, and he intended to purchase a ticket that would take him over the West Shore and another connecting line." He knew that the Wabash railroad, from which he bought the ticket, did not extend to New York, his place of destination, and that its eastern terminus was at Detroit. In addition to knowing that he would have to use other lines, he "knew that besides the coupons for the different portions of the journey there was a printed contract at the head of the ticket, but he did not read it until after the accident." Even in that case we held that the nature and extent of the contract was a question of fact, but as the evidence was conflicting and the referee had found for the defendant, we affirmed as to the second cause of action. As to the first cause of action, however, we reversed, because a nonsuit was granted by the referee, while we held that he should have passed upon the question in relation to an alleged contract for through transportation as one of fact: *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461, 54 N. E. 1.

While that case was decided by a divided vote and no opinion in its entirety received the assent of a majority of the judges, the judgment pronounced shows that it was necessarily held as is stated above. The leading authorities were cited and reviewed, so that further effort in that direction is unnecessary. We regard the Talcott case as controlling, and, without further discussion, affirm the judgment appealed from, with costs.

Judge O'Brien Dissented, saying: "The question, therefore, is whether upon these facts the defendant can be held liable for the loss or abstraction of the plaintiff's baggage. It was shown, and the fact is not disputed, that when the trunk left the custody and control of the defendant it was in good order, and it seems to me that under such circumstances it is the settled law in this state that the defendant is not liable either for any accident happening to the passenger or any loss or injury to her baggage beyond the terminus

of its own line: *Milnor v. New York etc. R. R. Co.*, 53 N. Y. 363, *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500; *Kessler v. New York Cent. etc. R. R. Co.*, 61 N. Y. 538; *Auerbach v. New York Cent. etc. R. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290; *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461, 54 N. E. 1." He also referred to *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 102, 1 Sup. Ct. Rep. 425, 27 L. ed. 325, and *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. Rep. 136, 39 L. ed. 176, both of which, he claimed, were to the same effect as the other decisions cited by him. Judge Werner concurred with Judge O'Brien.

Contracts Limiting the Liability of an initial carrier for injury to freight while in the hands of connecting carriers are discussed in the monographic note to *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 88 Am. St. Rep. 101-103, on limitations of carrier's liability in bills of lading; and contracts limiting the liability of an initial carrier to such injury to baggage as occurs on its own line are discussed in the monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 362, on the liability of common carriers for the baggage of passengers. As to whether a notice of limited liability printed on the back of a bill of lading binds the shipper, see the note to *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 88 Am. St. Rep. 86, 87. It has been held that the holder of a passenger ticket is not bound by a restriction printed thereon, which limits the carrier's liability for baggage, unless he had notice thereof when he purchased it: *Ranchau v. Rutland R. R. Co.*, 71 Tenn. 142, 76 Am. St. Rep. 761; *Kansas etc. R. Co. v. Rodebaugh*, 88 Kan. 45, 5 Am. St. Rep. 715, and note.

LEARY v. CORVIN.

[181 N. Y. 222, 73 N. E. 984.]

RESULTING TRUSTS.—A Trust Resulted at the Common Law when one person paid purchase money for lands, and the conveyance was taken to another, but, under the statute of New York, no trust results under such circumstances, except when the grantee in such conveyance takes it in his own name without the knowledge of the person paying the consideration, or when such grantee, in violation of some trust, purchases land with moneys belonging to another person. (pp. 545, 546.)

A RESULTING TRUST does not Arise in favor of a person furnishing moneys used in the purchase of lands, a conveyance to which is taken in the name of another, unless the former furnishes the whole consideration or some aliquot part thereof, or for the value of some particular estate in the premises. (p. 546.)

RESULTING TRUSTS.—The General Contribution of a Sum of Money Toward the Purchase of Land is not sufficient to create a resulting trust, where the conveyance is taken in the name of another. (p. 546.)

A RESULTING TRUST cannot Arise in favor of a daughter who furnishes money to her father, to be by him employed in acquiring premises to be used as a home during his life, and, upon his

death, to go to such daughter, when no particular piece of property was in view when the money was furnished, and the amount when finally used did not constitute any aliquot part of the purchase price of the property. (pp. 546, 547.)

LIEN FOR MONEY Contributed with Which to Purchase Real Property.—If a daughter gives money to her father under an oral agreement between them that it shall be employed to acquire property to be used by him and her mother as a home during their lives, and, after their death, shall go to the daughter, and he subsequently acquired such property with this and other money under circumstances when no resulting trust arises in favor of the daughter, she has an equitable lien on such property for the amount so furnished, with interest from the time the money was received by the father, which lien may be enforced after the death of her parents as against their grantees who are not purchasers for a valuable consideration. (p. 548.)

David McClure and Michael J. Scanlan, for the appellants.

J. Aspinwall Hodge and J. Philip Berg, for the respondent.

224 CULLEN, C. J. The plaintiff is the only child and heir at law of Patrick J. Corvin and Mary, his wife. In February, 1880, said Patrick acquired by deed the premises known as 278 East Broadway, in the city of New York, for the sum of six thousand five hundred dollars. He and his wife continued to reside on the premises during their lives. In December, 1890, Patrick and Mary deeded the property in fee to the defendant the Church of St. Mary for a nominal consideration, and at the same time the church conveyed back to said Patrick and Mary an estate in said premises during their joint lives and that of the survivor. In February, 1892, Mary Corvin died. In December of the same year the church conveyed the premises to the defendant, Lizzie J. Hurley, now Corvin, and at the same time Patrick quitclaimed to her his life estate therein. The defendant, Lizzie Hurley, mortgaged the premises for the sum of six thousand dollars, five thousand dollars of which she gave to the defendant, the Church of St. Mary, and thereupon conveyed to Patrick Corvin a life interest in said premises. Subsequently the said Corvin married the said Lizzie Hurley. Patrick Corvin died in March, 1898, and in August of the same year the plaintiff instituted this action. It is alleged in the complaint that prior to the purchase of the premises by Patrick Corvin the plaintiff drew from the savings bank moneys belonging to her, amounting to the sum of thirteen hundred dollars, and gave them to said Patrick under the agreement that the said money should be applied to the purchase of a house, which was to be used and enjoyed by said Patrick and his wife Mary during their lives, and upon the death of the survivor of them the

said premises were to go and become the property of the plaintiff in fee simple. The complaint further charged that the conveyance by Patrick and Mary Corvin to the defendant, the Church of St. Mary, was made in trust to convey the same to the plaintiff after the death of the survivor of her said parents, and that the conveyance by the church to the defendant, Lizzie Hurley, was made without consideration and in fraud of the plaintiff's rights. The plaintiff demanded judgment that the said deed to the defendant, the Church of St. Mary, be declared to be ²²⁵ in trust for her use and benefit and that she be declared the owner of the premises described therein; that the deed to the defendant, Lizzie Corvin, be declared fraudulent and void; that said defendant account for the rents and profits of the premises received by her and that the plaintiff recover of the defendant, the church, the sum of five thousand dollars paid to it from the proceeds of the mortgage placed on the premises by the defendant, Lizzie Corvin. The plaintiff succeeded at special term and judgment was awarded her substantially as prayed for in the complaint. That judgment has been affirmed by the appellate division by a divided court.

While the special term decided the case in favor of the plaintiff it did not find all the facts charged in the complaint. On the contrary, it rejected the claim that the conveyance by Patrick Corvin and his wife to St. Mary's Church was in trust for the plaintiff after the death of said grantors. The learned court based its decision on the original agreement between the plaintiff and her father, Patrick Corvin, and the subsequent acquisition of the property by the latter. The facts found are best stated in the following quotation from the decision of the court:

"In 1875, the plaintiff, the sole child of Patrick J. Corvin and Mary Corvin, entered into an arrangement with them by which it was agreed that if she would draw some thirteen hundred and eighty-five dollars from the savings bank in which she had deposited it to her credit, that they would add to it certain moneys, and with the funds thus provided would purchase a house for a home, where they would live until the death of the parents, and at their death the plaintiff would have the house.

"This arrangement was acquiesced in by all the parties, and on or about the seventeenth day of February, 1875, the plaintiff handed over to her father the said thirteen hundred and eighty-five dollars for the purchase of the home. For

some time no purchase was made, as no available house was found, and the money apparently remained in the hands of Patrick J. Corvin until 1880, the interval being employed in looking about for a suitable place. In the latter year the premises described in the complaint and known as ²²⁶ 279 East Broadway, in New York City, was purchased for six thousand five hundred dollars, the balance of the purchase price being furnished by Mrs. Corvin from the sale of certain United States bonds which she possessed. The deed to these premises was taken in the name of Partick J. Corvin, but that the deed stood in his name does not appear to have been known by the plaintiff. Her parents, and for a part of the time the plaintiff, resided in these premises down to the time of the death of the mother, Mary Corvin, which occurred on the third day of February, 1892." The further findings of the court relate to the subsequent conveyances and transfers of the property. It is unnecessary to refer to them, as the facts are substantially conceded and no claim is made that either of the defendants was a purchaser for value. As the decision of the appellate division was not unanimous, we are not precluded from examining the evidence, but in such a case the only question before us is whether there was any evidence to sustain the finding of the trial court. If so the finding is conclusive upon us. It would not be profitable to review the evidence. It is sufficient to say that, in our opinion, none of the findings of fact was destitute of any evidence for its support.

The question, however, remains whether the facts found entitled the plaintiff to the relief the court has awarded to her. At common law where one person paid the purchase money for lands and the conveyance of the same was taken to another, a trust resulted in favor of the person who paid the purchase money. This doctrine was carried to the extent of holding that the legal title vested in the party paying the consideration, and the lands could be sold on an execution against him. The Revised Statutes changed the common-law rule and enacted (1 Rev. Stats., p. 727, secs. 51, 53) that where a grant for a valuable consideration is made to one person and the consideration therefor paid by another, no trust results in favor of the person by whom such payment is made, except where the alienee named in the conveyance takes the same as an absolute conveyance in his own name without the knowledge of the person paying the consideration, or where such alienee, in violation of some trust, ²²⁷ purchases the land so conveyed with moneys be-

longing to another person. As the trial court found that the plaintiff was unaware that her father, Patrick Corvin, had taken an absolute deed in his own name, the case is not affected by the provisions referred to. The plaintiff's rights are to be determined under the common-law rule. Now, while that rule is as stated, that a trust results in favor of the person paying the consideration for a conveyance, it is the settled law that to bring a case within the rule the payment must be either of the whole consideration or of some aliquot part thereof, or for the value of some particular estate in the premises conveyed. The authorities to this effect are uniform: *White v. Carpenter*, 2 Paige, 217; *Sayre v. Townsends*, 15 Wend. 647; *McGowan v. McGowan*, 14 Gray, 119, 74 Am. Dec. 668; *Wheeler v. Kirtland*, 23 N. J. Eq. 22; *Perry v. McHenry*, 13 Ill. 227; *Baker v. Vining*, 30 Me. 121, 1 Am. Rep. 617. See *Brown on Frauds*, sec. 86. As is held in all these cases, "a general contribution of a sum of money toward the entire purchase is not sufficient," and this is the doctrine of the latest decision of this court on the subject in *Schierloh v. Schierloh*, 148 N. Y. 103, 42 N. E. 409. It was there said by Judge O'Brien: "The payment by the wife of a part of the consideration for the conveyance to the husband does not vest in her any estate in the land." It may well be that had the plaintiff and her father, at the time of the purchase of the property, calculated the probable value of the remainder therein after the death of Patrick and his wife, and the plaintiff had contributed toward the purchase such value, there would have resulted in her favor a trust in said remainder. The learned trial judge in his opinion (not in his decision) says that the amount of the plaintiff's contribution was about equal to the value of such remainder calculated on the Northampton tables, though he admits that this was a mere coincidence and not the result of intention. The learned counsel for the respondent, however, concedes in his brief that the value of the remainder calculated on the principle of annuities was the sum of two thousand two hundred and ninety-five dollars and thirteen cents, while the plaintiff's contribution was only thirteen hundred and eighty-five dollars. Both the evidence and the findings show that ²²⁸ the plaintiff advanced her money toward the purchase of no particular piece of property, certainly not to the purchase of that which was actually acquired and is the subject of this action, but the payment was made to her father on his promise that he would buy a house which should go to her upon his death and that of her mother. Five years

elapsed between the payment of the money and the selection or purchase of any particular property. If the agreement found to have been made between the parties created a trust in favor of the plaintiff in the premises in suit it would equally create a trust in her favor had her father, Patrick Corvin, purchased a house at twice or at five times the price paid for the one actually brought. The indefiniteness of the agreement in this respect would seem an insuperable objection to its enforcement as a contract, if in other respects it was valid, which it was not but was void under the statute of frauds.

The learned trial court deemed the present case controlled by two decisions of this court (*Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640, and *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067). In those cases, as in the present one, there was a confidential relation, that of parent and child, between the parties to the original agreement. In other respects, however, the cases are essentially different. In the first case the plaintiff whose real property had been sold on execution confessed a judgment in favor of the defendant, his mother, to enable her to redeem from the execution sale and acquire the property herself, which she agreed to hold for the benefit of her son, subject, however, to certain claims she had against it. The action was brought to enforce that agreement, to which, being oral, the defendant pleaded the statute of frauds. The plaintiff had judgment, which was affirmed in this court. It was held that the agreement was not one for the sale of the land, but an agreement to hold the land in trust for the benefit of the plaintiff. It is to be observed that the action was brought to recover property that had been acquired from him on the faith of the agreement and under the relation of trust and confidence which obtained between parent and child, and not to enforce ²²⁹ an executory agreement for the transfer of the land, in which the plaintiff had previous thereto no interest. The plaintiff simply sought to recover his own. In the second case a mother made a voluntary conveyance to her son on his agreement to hold the property conveyed in trust for himself and the other children of the grantor, who were at the time minors. After the death of the mother the son sold the property and with a portion of the proceeds thereof bought certain other premises. An action was brought against the defendant by his brothers and sisters to recover their shares in the last-named property. It was held that the trust on which the mother made the original conveyance to the son, though declared only orally, would be

enforced because of the confidential relation between the parties and other circumstances to which it is unnecessary to refer. The trust being established as to that property, of course the rights of the cestui que trust immediately attached to the second piece of property which had been acquired by the proceeds of the sale of the first. Here again there was no attempt to obtain the benefits of an executory contract to sell any interest in real estate but to enforce the trust upon which the property was conveyed by the original owner. The case before us is entirely different in principle. Prior to the purchase of the premises in litigation by her father the plaintiff had no interest therein nor did the owner thereof convey the same to her father upon any trust. Any equitable title in the property inured to the plaintiff, if at all, either as a resulting trust by virtue of her contribution toward the consideration of the purchase or through the enforcement of the executory contract of her father, that after his death and that of his wife the plaintiff should have the property. As we already have seen both of these claims fail.

It does not follow, however, that the plaintiff is entitled to no relief. She made her contribution to the purchase of the property on the faith of an agreement with her father which he has violated by failing to secure to her the property upon his death and the relation between the parties was one of ²³⁰ trust and confidence. The plaintiff's money having been thus appropriated to the acquisition of the property she has an equitable lien thereon for its amount, and as she has been induced to let it remain in the property in reliance upon her father's promise, without receiving any compensation therefor, now that that promise has been violated she is justly entitled to interest from the time of the original payment to her father.

All the facts having been found by the trial court and affirmed by the appellate division and all the appellants' objections and exceptions being before us, it is not necessary that there should be a new trial unless the plaintiff, respondent, elects that such course should be had. Therefore, if the plaintiff assent thereto, the judgments of the special term and the appellate division should be so modified as to declare that the plaintiff has a lien upon the premises described in the complaint for the sum of thirteen hundred and eighty-five dollars, with interest thereon from February 17, 1875, less any payments that have been made to her by the receiver of the rents and profits heretofore appointed in this action; that the premises be sold to satisfy and discharge said lien and in case of any defi-

ciency arising on such sale the plaintiff recover the same from the defendant, the Church of St. Mary, and that for that purpose the proceedings be remitted to the special term to ascertain the amount due the plaintiff and for action in accordance with this direction, and as modified said judgments of the special term and appellate division be affirmed, without costs in this court to either party. In case of the failure of the plaintiff to assent to the foregoing modification within twenty days, then a new trial should be ordered, costs to abide the event.

Gray, O'Brien, Bartlett, Haight and Vann, JJ., concur.

Werner, J., taking no part.

Judgment accordingly.

If One Buys Property with the Money of another, a trust results in favor of the latter: Stevenson v. Kyle, 42 W. Va. 229, 57 Am. St. Rep. 854; Dorman v. Dorman, 187 Ill. 154, 79 Am. St. Rep. 210; Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81. But it seems that the contributing to the purchase of land of a sum of money which is not an aliquot part of the whole, does not create a resulting trust in favor of the person so contributing: Allen v. Caylor, 120 Ala. 251, 74 Am. St. Rep. 81.

DONAHUE v. KEYSTONE GAS COMPANY.

[181 N. Y. 313, 73 N. E. 1108.]

PUBLIC STREETS.—The Maintenance of Trees in a Street for the Purpose of Ornament and Shade is a proper street use, sanctioned both by statute and the custom of the country. They thus maintained are a part of the street, to be enjoyed and used by the public traveling therein, the same as a good roadbed, sidewalk, pavement, or anything else in the street which contributes to the comfort and pleasure of the traveler. (p. 551.)

PUBLIC STREETS.—The Owner of a Lot Abutting on a Public Street, the Fee of Which is in the Municipality, has, by virtue of proximity, special and peculiar rights, facilities, and franchises in the street not common to the citizen at large. (p. 553.)

PUBLIC STREETS.—The Rights of an Abutting Owner on a public street who does own, and of one who does not own, the fee are practically the same as long as the street is kept open. (p. 555.)

PUBLIC STREETS, Right of Abutting Property Owner to Recover for Injuries to Shade Trees in.—The owner of residence property abutting on a public street, though he does not own the fee thereof, has such an interest in ornamental shade trees standing in such street in front of his land that he may recover as damages the amount which the value of his land is reduced by the killing of such trees through the negligent acts of a gas company in permitting its gas to escape from pipes in the soil about their roots. (p. 556.)

J. H. Waring, for the appellant.

W. D. Parker, for the respondent.

314 VANN, J. The plaintiff has the rights of an abutting owner upon the west side of a public highway known as Union street, in the city of Olean, but he owns no part of the bed of the street. The defendant is a foreign corporation which supplies natural gas to the inhabitants of the city for light and fuel by means of pipes laid beneath the surface of the streets in the usual way. There are two dwelling-houses on the premises of the plaintiff, one of which he occupies as a residence while the other is leased to a tenant. In 1898, near the west margin of Union street and directly in front of the plaintiff's premises but not upon his land, there were five maple trees about thirty-five years old, "all in thrifty condition and furnishing good shade." These trees stood twenty-five feet from the **315** front line of the plaintiff's houses and made them attractive to purchasers and tenants. About 1900, as the jury found upon sufficient evidence, four of these trees were destroyed by the negligence of the defendant in permitting gas to escape from its pipes into the soil about the roots of the trees. This action was brought to recover the damages alleged to have been sustained by the plaintiff by reason of these facts, and the jury found a verdict in his favor for the sum of one hundred and fifty dollars. Upon appeal to the appellate division the judgment entered upon the verdict was unanimously affirmed, one of the judges concurring in the result only.

Upon the trial the court charged, among other things, as follows: "For the purposes of the disposition of this case I charge you as a matter of law that the plaintiff had a property right in those trees, although they were not planted upon lands that he had the title to, sufficient to permit him as a matter of law to maintain an action against any person who might wrongfully injure or destroy the same." The exception taken to this ruling presents the main question that we are called upon to decide.

The defendant claims that the plaintiff had no legal or equitable interest in the trees, because he did not own the land upon which they stood, and that, hence, he sustained no injury by reason of their destruction. The plaintiff claims that, as an abutting owner, he had a right in the trees in the nature of an easement attached to and forming a part of his premises, and that he was entitled to recover the damages caused to his

land by the loss of the trees through the wrongful act of the defendant. An interesting and important question is thus presented, upon which there is but little direct authority, although the courts have labored long to settle the principles of law governing the rights of those owning land upon a public street where the fee is in the municipal government.

The maintenance of trees in a street for the purpose of ornament and shade is a proper street use, sanctioned both by statute and the custom of the country: *Edsall v. Howell*, 86 Hun, 424, 33 N. Y. Supp. 892; *Cross v. Mayor etc.*, 18 N. J. Eq. 305, 313; 2 Rev. Laws 316 1813, c. 23, sec. 29; 2 Rev. Stats. 1898, 8th ed., sec. 127; Laws 1863, c. 93; Laws 1875, c. 215; Laws 1881, c. 344; Laws 1890, c. 568, secs. 43, 44. The trees thus maintained are a part of the street, to be enjoyed and used by the public traveling thereon the same as a good roadbed, sidewalk, pavement or anything else in the street which contributes to the comfort or pleasure of the traveler. As a general rule whatever renders a street more valuable to the people at large renders it more valuable to the abutting owner, for he has all their rights of user, besides other rights which are peculiar to himself. While the control of the street, regardless of where the title may be, of necessity is in the public authorities, and they may grade and improve it even to his detriment, still he has special rights therein, which are a species of property that cannot be taken from him without compensation awarded according to the law of the land: *Story v. New York Elev. R. R. Co.*, 90 N. Y. 122, 179, 43 Am. Rep. 146.

Among his rights are those of light, air and access, each long resisted, but now well established as safe from the onslaught of wrongdoers, even including those who erect an elevated railroad in a street with the sanction of law: *Lahr v. Metropolitan Elev. Ry. Co.*, 104 N. Y. 268, 10 N. E. 528; *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1, 19 Am. St. Rep. 461, 25 N. E. 496, 11 L. R. A. 634; *Kane v. New York Elev. R. R. Co.*, 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640. But during the long struggle which saved these rights of the abutting owner, he did not always win, for the necessary annoyance caused by a use of the street authorized by law, such as the noise of a train passing on an elevated railway, gives him no right to permanent damages, unless some part of his land is taken: *American Bank Note Co. v. New York Elev. R. R. Co.*, 129 N. Y. 252, 29 N. E. 302. This was so held upon the

ground that where the use is authorized and is for the benefit of the public, he must endure the discomfort incidental to a lawful use and essential to the public welfare. But whatever pollutes the air he breathes, such as smoke and gas, shuts the light from his windows or hinders access to his door, such as an elevated railroad structure and the trains thereon, must be reckoned for, even by the technical wrongdoer ⁸¹⁷ acting with some sanction but not the full sanction of law. In settling the law to this extent, general expressions have sometimes been used by the court, indicating as its opinion that these easements of light, air and access are the only rights which an abutting owner has in a public street of which he owns no part. Courts settle the law by passing upon actual questions, not by advancing abstract theories, and the words of exclusion should be limited to the facts of the case in hand when they were used, as was doubtless the intention.

It is to be observed that we are not dealing with a question arising between an abutting owner and the city authorities, for in such a case the rights of the latter are paramount, so long as the road is kept open and unobstructed. Nor are we dealing with a question between him and a corporation authorized to use the streets for some public purpose, where it becomes necessary to cut shade trees in order to effect that purpose. It is not the question which might have arisen when the defendant many years ago laid its pipes in the street, if it had then been necessary to cut the trees which are the subject of this action in order to do the work properly and they had been cut for that purpose with the approval of the city authorities. The defendant did not let its gas escape with the consent of the officers in control of the street. It did not act in accordance with law, but in violation of law. It was not a semi-wrongdoer as were the elevated railroad companies, but an absolute wrongdoer. It was a naked trespasser and its act was a nuisance which inflicted special injury upon private property, for it reduced the value of the plaintiff's premises by the sum of one hundred and fifty dollars, as the jury found. Everyone has a right to use a public street, but no one has a right to stand in front of another's residence and play a hurdy-gurdy or fog-horn hour after hour and day after day to the annoyance of the owner and his family. That would be a trespass, even if the offender did not touch the property of the abutting owner, whose right to damages could not be questioned. If a mere trespasser should maliciously cut shade trees stand-

ing in a street, the fee of which was in the city, could the abutting ³¹⁸ owner recover damages? That is in substance the question before us, for while the defendant did not act willfully in destroying the trees it acted negligently, after due warning and was a simple wrongdoer.

The defendant insists with great persistence that it did not injure the plaintiff, because it did not touch his premises or throw anything upon them. Interference with access or with light does not necessarily involve contact with tangible property, yet either is a trespass upon a property right. Why should the law protect the air of an abutting owner from the smoke of a semi-trespasser and not protect the coolness of the air from injury by an absolute trespasser? If the air is better in the one case, it is in the other, for the difference is in degree only. Upon what principle can pure air be called a property right and cool air no right at all?

What is the principle upon which interference with light, air and access is made the subject of damages and sometimes of an injunction? Why do courts hold that these rights are property? What is their origin and nature? Why does the abutting owner have rights in the street which do not belong to the general public? These questions were asked in substance in the first case which recognized the existence of the rights and they were answered for the purpose of that case as follows: "Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. . . . This right or privilege constitutes an easement in the bed of the street, which attaches to the abutting property of the plaintiff and constitutes private property within the meaning of the constitution, of which he cannot be deprived without compensation": *Story v. New York Elev. R. R. Co.*, 90 N. Y. 122, 146, 179, 43 Am. Rep. 146.

In a later case, Judge Andrews, speaking of the right, said: "But however difficult it is to trace its origin or refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in the municipality, ³¹⁹ has, by virtue of proximity, special and peculiar rights, facilities and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property of which he cannot be deprived by the legislature or municipality or by both combined without compensation": *Kane*

v. New York Elev. R. R. Co., 125 N. Y. 164, 180, 26 N. E. 278, 280, 11 L. R. A. 640. In *Bohn v. Metropolitan Elev. Ry. Co.*, 129 N. Y. 576, 587, 29 N. E. 802, 804, 14 L. R. A. 344, Judge Peckham stated that "although the land itself was not taken, yet the abutting owner by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air and of access from such street."

So a learned commentator, citing authorities from various states to support his position, has laid down the following proposition: "An owner whose land abuts upon a highway necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of the location of the street and are not enjoyed by the general public": Jones on Easements, sec. 489.

The easement, as for convenience it may be called, consists in the right to have the street kept open and includes all the incidental privileges which may fairly be implied from that right. It is the proximity of the street, the situation of the abutting land with reference to an open street, which gives to the abutting owner the special right to the enjoyment and use of whatever is permitted or maintained by the public authorities as a part of the street. These easements are created by operation of law when streets are opened and they are presumed to be paid for by taking the benefits into account when land is procured for the purpose. Such benefits are "coextensive with the use" to which the street may by law be devoted: *Edsall v. Howell*, 86 Hun, 424, 430, 33 N. Y. Supp. 892; *Hardenburgh v. Lockwood*, 25 Barb. 9; *Griffin v. Martin*, 7 Barb. 297; *Village of Lancaster v. Richardson*, 4 Lans. 136, 140. They frequently induce owners of land to donate or dedicate a part thereof for the purpose of a street. If the street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally and the abutter ⁸²⁰ is benefited specially. So long as a hitching-post or a shade tree is physically and legally a part of the street, he is entitled to all the special benefits which flow therefrom to his lot, free from interference by a wrongdoer, but subject to removal by the municipal government. The easement extends to all parts of the street which enlarge the use and increase the value of the adjacent lot. It is not limited to light, air and access, but includes all the advantages which spring from the situation of the abutter's land upon the open space of the street. These rights exist whether he owns the fee of the street or not. As

they are dependent upon the street and cannot exist without it, they are a part of it and thus become "an integral part of the estate" of the abutting owner, subject to interference by no one except the representatives of the public.

No adequate reason is given for the attempt to limit the easement to light, air and access. What distinction in principle is there between these benefits, which are incidental to a street, and any other incidental advantage which adds to the value of abutting land? Why should the law extend protection to the one and withhold it from the other? Is any danger to be apprehended from the practical working of a rule to protect shade trees in our streets from destruction by the careless or malicious? If an enemy wantonly cuts down trees standing in the street in front of his neighbor's lot, have the courts no power to redress the wrong done to private property? The shade trees of our cities and villages are the pride of the people. On many streets they add largely to the commercial value of land. Is the law so tender toward wrongdoers as to virtually say to them, "If you cut down every graceful elm or beautiful maple standing in the streets of any city and can adjust matters with the authorities, you are safe, for no individual can call you to account, even if twenty per cent is taken from the value of his property?" The announcement of such a rule, directly or indirectly, would spread consternation throughout the state.

If the plaintiff had owned to the center of the highway, his right to recover damages would be beyond question, yet the ⁸²¹ difference between such an action and the one before us is theoretical rather than practical, because as long as the street is kept open, which is the invariable rule in cities and the general rule elsewhere, the abutting owner has substantially the same benefit in either case: *Halleran v. Bell Telephone Co.*, 177 N. Y. 533, 69 N. E. 1124, 64 App. Div. 41, 71 N. Y. Supp. 685; *Eels v. American Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; *Edsall v. Howell*, 86 Hun, 424, 83 N. Y. Supp. 892; *McCruden v. Rochester Ry. Co.*, 151 N. Y. 623, 45 N. E. 1133, 77 Hun, 609, 28 N. Y. Supp. 1135, 5 Misc. Rep. 59, 25 N. Y. Supp. 114; *Gorham v. Eastchester Electric Co.*, 80 Hun, 290, 30 N. Y. Supp. 125; 2 *Dillon on Municipal Corporations*, 4th ed., sec. 644a. Is it better to limit the recovery to cases founded upon a mere technicality, or to extend it to all where substantial injury is inflicted upon the abutting owner by the act of a wrongdoer in a public street? Which rule is better adapted to the needs of the people gener-

ally throughout the state? Which will promote justice in the greater number of cases? What is there to prevent the court from laying down the best practicable rule to restrain wrongdoers from cutting down shade trees standing in the street in front of people's homes? These questions were answered in a practical and, as we think, a correct way in a recent case decided by the appellate division of the second department, which held that "an owner of land abutting upon a city street whose ownership does not extend to the middle of the street, who has set out ornamental shade trees on the sidewalk in front of his premises at his own expense and with the sanction of the municipal authorities, is entitled to have such trees protected against negligent or willful destruction at the hands of third parties. He has a right in such trees in the nature of an equitable easement, and where one of them is girdled and destroyed by a horse, may recover from the owner of the horse the damages thus sustained": *Lane v. Lamke*, 53 App. Div. 395, 65 N. Y. Supp. 1090. This is the only case brought to our attention that is directly analogous, and we think it is founded upon sound legal principles which should be applied to the case before us. While the plaintiff did not set out the trees in question, he is entitled to the rights of his predecessor in title as an abutting owner who did set ³²² them out, and as they have stood so long in the street they are presumed to have been placed and maintained there with the consent of the municipal authorities. Even if the city of Olean has a right of action against the defendant, there can be no double recovery for the same injury because the damages in the two classes of actions are as clear and distinct as the causes of action themselves. The one involves the general rights of the city, while the other is limited to the injury to the special rights of the abutting owner. The wrongdoer cannot complain if he is made to pay for all the property he destroyed, even if part belonged to the plaintiff and part to the city.

We think that the charge of the learned trial justice that the plaintiff had a property right in the trees in question sufficient to enable him to maintain this action was correct. As no other question requires consideration the judgment appealed from should be affirmed, with costs.

Bartlett, Haight and Werner, JJ., concur.

Cullen, C. J., Gray and O'Brien, JJ., dissent.

Judgment affirmed.

The Owner of Land Over Which a Highway Passes has a right to maintain trees by the roadside, in a manner not obstructing travel, and they cannot be lawfully injured or destroyed, either by private individuals or the public authorities, when no necessity exists therefor. Thus if a gas company permits its pipes in the public streets to be out of repair, so that gas escapes therefrom and kills trees standing in the street, the owner may recover compensation therefor: See the monographic note to *Wright v. Austin*, 101 Am. St. Rep. 113.

LEWIS v. GUARDIAN FIRE AND LIFE ASSURANCE COMPANY.

[181 N. Y. 392, 74 N. E. 224.]

INSURANCE, Breach of Conditions Precedent Known to the Insurer.—If an insurance company, or its general agent, is at the time of issuing a policy notified of facts which, under the terms of the policy, would render it void if not noted thereon, the company cannot avail itself of such defense. (p. 559.)

INSURANCE—Agents of the Insurer, Who Deemed to be.—If a policy of insurance, when delivered, has written on it by officers or agents the words "Patterson & Son, Agents," this is sufficient to justify the jury in finding that such persons were such agents, though officers and clerks of the insurer testify, without contradiction, that it was the habit of the company whenever an application was presented for insurance through brokers, to write their names as agents on the policy, and that it was not intended thereby to state that such persons were in fact agents of the company. (p. 559.)

INSURANCE—Conditions Precedent, Failure of Agents to Notify Insurer of Breach of.—If a firm is the general agent of an insurer authorized to deliver policies, or is held out by the insurer to be such agent and possessing such powers, the firm can, as to persons dealing with it under its real or apparent authority, waive a condition precedent, even if notice of the fact is not given to the insurer. (p. 560.)

INSURANCE—Notice Given to One Agent, When Affects Others and the Assured.—Information imparted to one agent of the insurer in dealing with the assured may be imputed to the company and to another agent participating in those dealings, though in fact the second agent is ignorant of the information imparted to the first. Hence, if one of a firm of insurance agents is notified before a policy issues of a fact which by its terms makes it void, such fact must be deemed waived if the policy subsequently issues through its delivery by the other agent to whom such information had not been given. (p. 560.)

INSURANCE.—A Mortgagor and Mortgagee may Maintain a Joint Action on a policy of insurance against fire where the loss is made payable to the latter as his interest may appear. (p. 560.)

INSURANCE—Mortgagee, When a Proper Party Defendant. Under a policy of insurance against fire issued to a mortgagor and payable to the mortgagee as his interest may appear, there is but a single contract, and if the mortgagee refuses to join in an action on the policy, he is a proper party defendant under a statute pro-

viding that where the parties have a united interest, they must be joined as plaintiff, and if any refuses to join, he must be made a party defendant. (p. 561.)

JURISDICTION—Action Brought by Mortgagor on an Insurance Policy Where There is a Nonresident Mortgagee.—If a policy of insurance issues in favor of a mortgagor, but payable to a mortgagee as his interest may appear, and the latter and the insurer are nonresidents of the state, and the contract is made in another state, the courts of this state, nevertheless, have jurisdiction to entertain an action on the policy brought by the mortgagor to which the mortgagee is made a party defendant. As the mortgagor's interest pervades the whole recovery, his right to maintain the action cannot be impaired by the nonresidence of the mortgagee. (p. 561.)

George A. Strong, for the appellant.

William B. Ellison and Arnold L. Davis, for the respondents.

³⁹⁴ CULLEN, C. J. The action is on a fire insurance policy, the plaintiff being the assignee of the owner of the insured premises, and the defendant MacPherson the assignee of the mortgagee. The policy insured the mortgagor, loss, if any, payable to the mortgagee "as his interest may appear." The plaintiff's assignor is a corporation organized under the laws of this state and the plaintiff himself a resident and citizen of the state. The defendant MacPherson and his assignor are residents of the Dominion of Canada, the defendant insurance company an English corporation, and the contract of insurance was made in Montreal, Canada. The complaint, after making the usual statements requisite in an action on a fire insurance policy, alleged that the mortgagee refused to join with the plaintiff in the institution of the action, and that therefore he was made a party defendant thereto. The insurance company answered alleging a breach of the conditions of the policy in that other insurance had been effected on the property previous to the issue of the policy, which additional insurance was not noted or indorsed thereon. The defendant MacPherson answered, substantially repeating the allegations of the complaint and asking judgment against his codefendant that he be paid out of the insurance moneys the amount due on his mortgage. At the close of the evidence the trial court dismissed the complaint and the claim of the defendant MacPherson. Judgment was entered on this direction and ³⁹⁵ that judgment was reversed by the appellate division and a new trial granted. From the order granting a new trial an appeal has been taken to this court.

The policy was obtained from Patterson & Son, insurance agents at Montreal. In answer to the defense of other insur-

ance not noted on the policy (which fact was conceded) the plaintiff gave evidence that at the time the application was made for the policy Patterson & Son were informed of the existence of such additional insurance. The law is well settled in this state that if the insurance company or its general agent is at the time of the issue of the policy notified of facts which, under the terms of the policy, would render it void if not noted on the policy, the company cannot avail itself of such a defense, though a different rule prevails as to breaches of conditions occurring subsequent to the issue of the policy: *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80. This principle the learned counsel for the appellant concedes, but he insists, in the first place, that the evidence was insufficient to warrant a finding by the jury that Patterson & Son were the agents of the appellant. Without referring to the other evidence in this respect it is a sufficient answer to this claim to say that on the policy delivered by the appellant there was written in two places, one on the face of the policy, one on its back, "Patterson & Son, Agents," and it is conceded that this was done not by the agents but by the officers of the company in its office. It is true that some of the officers or clerks of the company testified that it was the habit of the company whenever an application was presented to it through brokers to so write the name of the brokers as agents on the policy, and that it was not intended to state by such indorsement that the brokers were in fact the agents of the company. This explanation, however, of what otherwise appeared to be an admission that Patterson & Son were the agents of the defendant was not conclusive; it presented a question of fact to be passed on by the jury. In addition to this the insured may have acted on the faith of the representation. ³⁹⁶ Upon receiving the policy and discovering the omission to note thereon the additional insurance it may have relied upon the rule of law that the omission to note such insurance did not vitiate the policy if Patterson & Son were the agents of the appellant, and, therefore, have omitted any step for the correction of the policy. It appeared that the policy in suit was issued from the general office in Montreal to the Pattersons, and that the member of that firm who obtained it was not the member with whom the plaintiff's assignor had dealt and to whom it had told of the other insurance. It is urged that as the member of the firm who obtained the policy was ignorant that there was other insurance on the property, necessarily there

could be no constructive notice to the company itself. This argument, however, overlooks the fact that if in truth Patterson & Son were the general agents of the appellant, authorized to deliver insurance policies, or were held out by the defendant as such agents and possessing such powers, that firm could as far as persons dealing with it under its real or apparent authority waive the condition even though it gave no notice of the fact to the company. Information imparted to one agent of a company in dealing with the insured may be imputed to the company and to another agent participating in those dealings, though in fact the second agent is ignorant of the information imparted to the first: *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254. The plaintiff's claim should, therefore, have been submitted to the jury.

It is strenuously contended by the appellant that the mortgagee was not a necessary or proper party defendant in the action, and that his claim was properly dismissed by the trial court, even if it be assumed that the plaintiff established the validity of the policy. It is admitted that under the authority of *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185, a joint action may be maintained on a fire insurance policy by mortgagor and mortgagee. But it is urged the case is not an authority for the proposition that when the mortgagee refuses to join as plaintiff he can, under sections ³⁹⁷ 446 and 448 of the Code of Civil Procedure, be made a party defendant. Section 448 provides that where parties are united in interest they must join as plaintiffs, and if any refuses to do so he must be made a party defendant. As I understand it, the contention of the appellant is that either the mortgagor or the mortgagee may sue separately (I suppose each to the extent of his own interest in the policy), and that neither is nor can be affected by the result of the other's action, and that hence neither, within the meaning of the code, has any interest in the subject of the action brought by the other. We think this proposition cannot be sustained. There is but a single contract between the parties by which one party is indemnified against loss but the insurance money is to be paid not to him, but to his appointee for his benefit: *Grosevenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391. Under such a contract the interests of the mortgagor and mortgagee are not separate and distinct, but the interest of the mortgagor is coextensive with the whole amount payable under the policy. He is interested not only in obtaining the surplus above the amount necessary to discharge the mortgagee's claim, but in seeing that his debt to the mortgagee or the lien on his prop-

erty held by the mortgagee is satisfied or reduced by the application of the insurance moneys. In this state a mortgagee to whom, by the policy, the loss is payable, may maintain an action in his own name and recover the whole amount payable under the policy; but in such case he recovers and holds the excess above his own claim as trustee for the mortgagor: *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619. But it does not at all follow that the mortgagor could sue in his own name on the policy holding the whole or part of the recovery as trustee for the mortgagee, or that each can maintain a separate action for his own interest. On the contrary, the right of the mortgagee to recover the entire sum payable is inconsistent with the right of the mortgagor to maintain a separate action for his part of the loss. If the interest of the mortgagor extends, as we have seen, to the whole insurance moneys, he is entitled to maintain an action coextensive with his interest. ³²⁸ Granting the right of the mortgagor to maintain such an action it is clear that to the action the mortgagee must be a party, for payment by the terms of the policy is first to be made to him to the extent of his interest. This was so held in *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516, nearly half a century ago. The case has never been overruled or criticised and is cited by this court as authority in *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185. If the mortgage had been satisfied, a different rule might prevail and the mortgagor sue in his own name. But while the mortgage is outstanding the mortgagee is a necessary party to the mortgagor's action.

These views also dispose of the claim that because the defendants, the mortgagee and insurance company, are nonresidents and the contract was made without the state, our courts have no jurisdiction over the mortgagee's claim. This position might be well founded if the claims of the mortgagor and mortgagee were several and distinct. But as the mortgagor's interest pervades the whole recovery his right to maintain an action in the courts of the state cannot be impaired by the nonresidence of the mortgagee.

The order appealed from should be affirmed, and judgment absolute rendered for plaintiff and for defendant MacPherson on the stipulation, with costs.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, JJ., concur.

Ordered accordingly.

If an Insurance is Effected on property, loss, if any, payable to the mortgagee, he is a necessary party to an action on the policy, though his interest is less than the amount of the mortgage: *Burlington Ins. Co. v. Lowery*, 61 Ark. 108, 54 Am. St. Rep. 196. Consult, in this connection, *Lowery v. Insurance Co.*, 75 Miss. 43, 65 Am. St. Rep. 587; *Capital City Ins. Co. v. Jones*, 128 Ala. 361, 86 Am. St. Rep. 152. That a mortgagee, where the loss is made payable to him as his interest may appear, may maintain an action on the policy, see *Christenson v. Fidelity Ins. Co.*, 117 Iowa, 77, 94 Am. St. Rep. 286; *Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 Am. St. Rep. 529; *Peck v. Girard etc. Ins. Co.*, 16 Utah, 121, 67 Am. St. Rep. 600.

PEOPLE v. MARR.

[181 N. Y. 463, 74 N. E. 481.]

AN INJUNCTION not Only Restrains the Parties to the Action, but also, when so drawn, those who act under or in connection with the party as attorneys, agents, or employes. (pp. 565, 566.)

INJUNCTION, Violation of by Persons not Parties to the Action.—No person with knowledge of the terms of an injunction, even if not a party to the action, can act or co-operate with a party in doing a prohibited act without incurring the penalty prescribed by the statute. (p. 566.)

INJUNCTION Against Labor Unions, Effect of on Members not Parties to the Action.—If an injunction issued, restraining a labor union and each of its members, agents, servants, and representatives from threatening or intimidating workmen in the plaintiff's employ or who come to him for employment, and from interfering with his business by any unlawful means, members of such union who afterward violate such injunction are, if they had knowledge of its issuing and terms, though they were not parties to the action, guilty of contempt of court. (pp. 566, 567.)

INJUNCTION, Criminal Contempt in Violating.—The Fact that an Injunction was not Personally Served upon Agents of the Defendant who were guilty of violating it, does not deprive the court of the power to punish them for a criminal contempt. (p. 567.)

CONTEMPT—Costs in Proceedings to Punish.—By the statutes of New York there is no authority to impose costs in proceedings to punish a criminal contempt. (p. 568.)

Theodore E. Hancock and D. B. Keeler, for the appellants.

Edgar F. Brown, for the respondents.

464 VANN, J. During the spring of 1903 the relators employed a large number of workmen in operating their foundry at Syracuse, many of whom were members of the Iron Molders' Union No. 80, an unincorporated association, organized in the interest of mechanics who were iron molders by trade. On the 15th of May, 1903, a strike was declared by said union

and the most of its members employed by the relators ceased to work and tried to induce those who remained to cease work also, as well as to dissuade others who had not been thus employed from accepting employment at said factory. A picket line was established, threats made, intimidation practiced and finally violence was resorted to. An action was commenced by the relators to recover damages from the union for interfering with their business and to restrain its ⁴⁶⁵ members from the use of force, threats or fear in order to keep away those who wished to work. After notice and a hearing a temporary injunction was issued by a justice of the supreme court restraining "the Iron Molders' Union, No. 80, its each and every member, said defendants and each of them, their agents, servants, representatives and coadjutors and all persons connected with them or either of them, . . . from assaulting, menacing, threatening or intimidating, whether by manner, attitude, speech, numbers or other act or means, the men and workmen in plaintiffs' employ, or who come to plaintiffs for employment, and from interfering with said plaintiffs' business by any unlawful means for the purpose of preventing any person or persons who now are or may hereafter be in plaintiffs' employment from continuing therein, or who being desirous of entering said employment from doing so or continuing therein."

Subsequently, a motion was made to punish John Lillis, Kyran Powers, Otto Benz and Michael Strozik for contempt in violating said injunction, and upon the hearing a referee was appointed to take the evidence of the parties and their witnesses and report the facts with his opinion. After taking much testimony and upon due deliberation the referee reported that Lillis, Benz and Powers were guilty of contempt in violating said order, but that Strozik, owing to his ignorance of the English language, did not know enough about the terms of the injunction to warrant his punishment. The referee found that the injunction had been served personally upon said Lillis, who was defendant in the action, and that Benz and Powers, who were not defendants and upon whom the injunction had not been served, knew of the existence and the terms thereof when they disobeyed it. The report of the referee was confirmed by the special term and the three persons named were adjudged guilty of contempt and punished by fine and imprisonment. An appeal was taken to the appellate division, where the order of the special term was affirmed

unanimously as to Powers and Lillis, but one of the justices dissented as to Benz upon the ground that the evidence ⁴⁶⁶ did not "satisfactorily establish that he was guilty of contempt."

An act in willful contempt of a court of justice or its process is an offense against the people of the state. Government by law cannot exist without courts and courts cannot enforce the law unless disobedience of their orders is properly punished. The wrong done to a party by the violation of an order made by a court for his protection is of less importance than the wrong done to the public by obstructing the course of justice and bringing dishonor upon the law itself. This is not a case of mere civil contempt where a fine is imposed mainly to indemnify a party for a private injury, and incidentally to vindicate the authority of the court as an agency of public justice. We are now dealing with a criminal contempt, not in the interest of a party merely, but in the interest of the public, to compel obedience to a lawful mandate of the supreme court and to punish resistance thereto as in the nature of a crime. There are three parties to every proceeding to punish for a criminal contempt—the plaintiff, the defendant and the people. If a fine is imposed it goes into the public treasury when paid, and is for "punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty and not at all as a means of securing indemnity to an individual": *People v. Court of Oyer & Terminer*, 101 N. Y. 245, 248, 54 Am. Rep. 691, 4 N. E. 259. While the court may be set in motion by a person who has been injured, it acts to punish the wrong to the public rather than to redress the private injury.

All of the appellants knew that the injunction had been issued, one of them because it was personally served upon him and the others because they were present at a meeting held by the strikers when the existence and contents of the order were stated and advice was given by one of the leaders to keep within the law. There was also evidence tending to show that they discussed the terms of the injunction with different persons, talked about what they could and could not do in view of its command, stated who their attorney was, ⁴⁶⁷ when the motion to vacate would be heard and the like. Neither in their answering affidavits nor in their testimony as witnesses before the referee did they deny that they knew of the existence and the terms of the injunction. They confined their testimony mainly to a denial that they had used threats

or violence, and upon this question there was a conflict in the evidence. The referee found that on the 2d of July, 1903, Ludwig Werner, an employé of the plaintiffs, as he left their factory, was assaulted by some of the strikers. He went across the street and was followed by Benz and others. In a threatening manner and with intent to intimidate Werner and prevent him from continuing in the employment of the plaintiffs, Benz said to him: "If you go into that shop again we will kill you." When the order to show cause was served Benz was told that he frightened Werner "pretty badly," and he replied, "That is what I wanted to do; I guess I have a right to talk; Stearns can't stop me from talking."

On the 26th of June, 1903, Albert Thurston, who was in the employ of the plaintiffs, left their factory when Powers took hold of his arm and said: "If you come back here again, you will get your punching."

On July 3d, as said Thurston was entering the factory to work he was again stopped by Powers, who said: "If you go down there to work you will get your God damned head plunked. You keep out of here." On the same day at about 5 o'clock in the afternoon as Thurston and one Ernest Seib were leaving the factory they were met by some strikers, one of whom asked if they intended to keep on working for Stearns. They said they did and were thereupon assaulted, beaten and kicked by seven or eight strikers. Powers and Lillis were present and both incited the crowd to attack Thurston, Lillis saying, "Now is your time," while Powers said, "Slug him one." The referee further found that these acts were done for the purpose of intimidating Thurston and Seib and preventing them from continuing to work for the plaintiffs. These facts find ample support in the evidence and after the concurrent action of the courts below they are ⁴⁶⁸ not open to review by this court. We are compelled to accept them as they were found by the referee and affirmed by the supreme court both at special term and in the appellate division.

The injunction permitted the use of all peaceful methods to induce workmen to leave the plaintiffs and join the strikers, but it forbade force, threats and intimidation. Both Benz and Powers used threats and Powers and Lillis instigated an assault. "A person who directly or indirectly counsels, commands, induces or procures another to commit" an assault is guilty of assault himself and subject to punishment as a

principal: Pen. Code, sec. 29. When peaceable persuasion ended and threats and force began, both the command of the injunction and the command of the law, independent of the injunction, were violated. This is a land of free speech, but freedom of speech does not permit the use of threats when an injunction is out against it. While persuasion is lawful, threats are not, and it is dangerous to experiment in order to see how near one may come to a violation of an injunction without actually violating it. The command of the people, speaking through their supreme court, is not to be trifled with: High on Injunctions, 3d ed., sec. 1427.

It is insisted, however, in behalf of Benz and Powers that they cannot be adjudged guilty of criminal contempt, because they were not parties to the action in which the injunction was issued. This position is unsound. An injunction not only restrains the parties to the action in which it was granted, but also, when so drawn, those who act under or in connection with a party, as attorneys, agents or employés. No person with knowledge of the terms of an injunction, even if not a party himself, can aid or co-operate with a party in doing the prohibited act without incurring the penalty prescribed by statute. Otherwise, in order to make an injunction effective it would be necessary to join every person who could become an agent of a party in violating it. The law is not so tender of those who defy its power and trample upon its command as to exempt them from punishment because ⁴⁶⁹ they were not named as defendants in the action: *People v. Dwyer*, 90 N. Y. 402; *People v. Pendleton*, 64 N. Y. 622; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Rorke v. Russell*, 2 Lans. 242; *Rochester etc. R. R. Co. v. New York etc. R. R. Co.*, 48 Hun, 190. The Iron Molders' Union was a party to the action, and the mandate was addressed not only to it and "its each and every member," but to all the defendants, their agents, representatives and coadjutors, as well as to those connected with them. The appellants were members of the union, were employed by it to act as pickets around the plaintiffs' plant, and each was paid at the rate of a dollar a day for his services in that capacity. They were parties to the injunction because they were mentioned therein as members of the union. They were the agents and employés of a party, eo nomine, engaged in doing its work and subject to the same punishment as if they had all been formally named as parties defendant. In a recent case, where the agents and servants of a party were punished for willful disobedience of an injunction

order, although they were not parties to the action, Judge O'Brien, speaking for the court, said: "The appellants were the agents and servants of the defendant. The restraining words of the order included them as well as their employer. By the service of it upon them, they were informed that a suit had been commenced to perpetually restrain the production of the play, and that the court had enjoined the production thereof in the meantime and during the pendency of the action. The willful disobedience of the order of the court served under such circumstances is a contempt of its authority, and this result is not relieved by the circumstance that the summons in the action had not yet been served upon the defendant when the order was disobeyed": *Daly v. Amberg*, 126 N. Y. 490, 496, 27 N. E. 1038, 1039.

In *Rigas v. Livingston*, 178 N. Y. 20, 24, 70 N. E. 107, Judge Cullen said: "It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants or act in ⁴⁷⁰ collusion or combination with them. . . . Authorities illustrating the rule might be cited to an indefinite extent, but the underlying principle in all cases of this class, on which is founded the power of the court to punish for the violation of its mandate persons not parties to the action, is that the parties so punished were acting either as agents or servants of the defendants or in combination or collusion with them, or in assertion of their rights or claims."

It is further insisted in behalf of the same appellants that they cannot be lawfully punished for criminal contempt, because the injunction order was not personally served upon them. The rule upon the subject is well settled. "This court has upheld proceedings in the supreme court, punishing parties for contempt in violating an injunction who had knowledge of it, though not served, and also the agents and attorneys of parties having like knowledge of the granting of the order, though it was imperfectly or irregularly served": *Daly v. Amberg*, 126 N. Y. 490, 496, 27 N. E. 1038, citing *Abell v. New York etc. R. R. Co.*, 18 Wkly. Dig. 554; affirmed, 100 N. Y. 634; *Koehler v. Farmers' and Drovers' Nat. Bank*, 6 N. Y. Supp. 470, 17 N. Y. Civ. Proc. Rep. 307; affirmed, 117 N. Y. 661, 22 N. E. 1134. See, also, *People v. Rice*, 80 Hun, 437, 30 N. Y. Supp. 457, 144 N. Y. 249, 39 N. E. 88; *Hull v. Thomas*, 3 Edw. Ch. 236; *People v. Brower*, 4 Paige, 405; *Livingston v. Swift*, 23 How. Pr. 1; *Hearn v. Tennant*, 14 Ves. Jr. 136. In the case last cited

the defendant and his attorney were committed for contempt in violating an order because they were present in court when the motion for an injunction was made, although they left before the decision was announced or the order signed. Lord Eldon said: "If these parties, by their attendance in court, were apprised that there was an order, that is sufficient; and I cannot attend to a distinction so thin as that persons standing here until the moment the lord chancellor is about to pronounce the order, which from all that passed they must know will be pronounced, can by getting out of the hall at this instant avoid all the consequences."

While there is a distinction in the nature of civil and criminal ⁴⁷¹ contempts, there is but slight difference in the procedure to punish and no requirement peculiar to either as to the personal service of the order, as distinguished from the actual knowledge of its existence and contents, however acquired. "As it respects disobedience to the order of a court, the sole difference appears to be that a 'willful' disobedience is a criminal contempt, while a mere disobedience, by which the right of a party to an action is defeated or hindered, is treated otherwise": *People v. Dwyer*, 90 N. Y. 402; *King v. Barnes*, 113 N. Y. 476, 480, 21 N. E. 182; Code Civ. Proc., sec. 8, 14. The primary object of the one is to protect private rights and of the other to maintain the dignity of the court and vindicate the authority of law. As each of the appellants knew of the existence of the injunction and its terms and clearly understood the nature of his acts, he was properly adjudged guilty of a criminal contempt, for his willful disobedience tended to cast discredit upon the administration of justice.

The special term awarded no costs against the appellants, but the appellate division inadvertently allowed costs against them. While the statute authorizes the imposition of costs in a proceeding to punish for a civil contempt, there is no such authority in a case of criminal contempt: *People v. Gilmore*, 88 N. Y. 626; *Boon v. McGucken*, 67 Hun, 251, 22 N. Y. Supp. 424, and cases therein cited.

The order appealed from should be so modified as to strike therefrom the allowance of costs and in all other respects affirmed.

Cullen, C. J., Gray, O'Brien, Bartlett, Haight and Werner, JJ., concur.

Ordered accordingly.

That the Violation of an Injunction constitutes a contempt, see *Ex parte Warfield*, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724; *Ex parte Miller*, 129 Ala. 130, 87 Am. St. Rep. 49; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932. As to whether this rule applies when the violator was not strictly a party to the suit, see *Savage v. Sternberg*, 19 Wash. 679, 67 Am. St. Rep. 751; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

Civil and Criminal Contempts are defined and distinguished, and the procedure for punishing them prescribed, in *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STATE v. MARBLE.

[72 Ohio St. 21, 73 N. E. 1063.]

PRACTICE OF MEDICINE—State Regulation of.—The right to practice medicine is subject to such reasonable regulations or conditions as the state, in the exercise of the police power, may prescribe. (p. 571.)

PRACTICE OF MEDICINE—Christian Science Treatment.—Prescribing, for a fee, Christian Science treatment for the cure of disease is practicing medicine within the meaning of the statutes of Ohio regulating such practice. (p. 575.)

PRACTICE OF MEDICINE—Christian Science—Constitutional Law.—A statute making the right to treat disease, for a fee, dependent upon the possession of reasonable qualifications, is not unconstitutional, in its application to a Christian Science practitioner, as an interference with the right to worship God according to the dictates of his conscience. (p. 576.)

PRACTICE OF MEDICINE—Christian Science—Constitutional Law.—A statute regulating the practice of medicine, which excludes no one possessing reasonable qualifications, is not unconstitutional as discriminating against Christian Scientists, in that it makes no special provision for them, while it provides that anyone possessing certain qualifications may practice osteopathy. (p. 581.)

• Roy H. Williams, prosecuting attorney, for the plaintiff in error.

John Ray, for the defendant in error.

22 SUMMERS, J. On the thirteenth day of June, 1903, an information, duly supported by affidavit, by the prosecuting attorney of Erie county was filed in the probate court of that county, charging that the defendant had, on the first day of October, 1902, for a fee, prescribed and recommended Christian Science treatment for the use of one Christ Hehl for the cure and relief of rheumatism.

The information, as amended, so far as it is material to set it forth, is as follows: "Did knowingly, willfully and unlawfully practice medicine in the state of Ohio and county aforesaid without having first complied with the provisions of the act of the general assembly of the state of Ohio entitled, 'An act to regulate the practice of medicine in the state of Ohio,' passed February 27, 1896, and amended April 14, 1900, and April 21, 1902, in this that at the time and place aforesaid, he, the said Oliver W. Marble, did for a fee, to wit, the sum of five dollars, prescribe and recommend for the use of one Christ Hehl, a certain application, operation and treatment, to wit, a system of mental treatment, commonly known as Christian Science, the exact nature of which treatment is to the prosecuting attorney unknown, for the treatment, cure and relief of a certain bodily infirmity and disease, commonly called rheumatism, he, the said Oliver W. Marble, at the time²³ aforesaid, not having obtained or received from the state board of medical registration and examination of the state of Ohio a certificate entitling him, the said Oliver W. Marble, to practice medicine, or surgery or midwifery within the state of Ohio, as required by the act aforesaid."

The defendant plead not guilty. The trial resulted in a verdict of guilty and he was sentenced to pay a fine of twenty dollars and costs. On error the court of common pleas reversed the judgment and discharged the accused on the ground that sections 4403c, 4403d, 4403f and 4403g of the Revised Statutes, in so far as they relate to Christian Science practitioners, are unconstitutional, for the reason that they unfairly discriminate against those engaged in practicing the healing art by Christian Science methods.

²⁴ The right to practice medicine has been so long and so universally subject to state regulation that it might almost be said to be not an absolute right but a privilege or franchise. Assuming, however, that it is an absolute right, it is conceded that it is subject to such reasonable regulations or conditions as the state in the exercise of the police power may prescribe: *France v. State*, 57 Ohio St. 1, 47 N. E. 1041; *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 1036, 41 L. R. A. 689.

²⁵ The contention of counsel for the defendant is: 1. That prescribing, for a fee, Christian Science treatment for the cure of a bodily ailment is not practicing medicine within the meaning of the statute; 2. That Christian Science is a religious be-

lief and that defendant in giving the treatment, did so in obedience to a religious and conscientious duty or, in other words, was worshipping God according to the dictates of his conscience, and that a statute interfering therewith is unconstitutional as depriving him of his natural and indefeasible right to worship Almighty God according to the dictates of his own conscience; 3. That if Christian Science is a school of medicine, the act discriminates against Christian Science in that it has made provision for the examination of the practitioners of other schools of medicine that are related to other theories of medicine but that it has made no such provision for the Christian Science practitioner, but, on the contrary, requires him to take the same examination that is prescribed for the so-called regular physician.

It is not necessary to notice the various statutes regulating the practice of medicine that have been passed in this state. The first was passed in 1811 and numerous acts have since been passed down to the act of 1902 involved in the present controversy. Reference is made to them in the briefs of counsel in *State v. Gravett*, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325, 55 L. R. A. 791. It is sufficient for present purposes to say that in 1896 a comprehensive act, entitled "An act to regulate the practice of medicine in the state of Ohio," was passed. It provided a state board of medical registration and examination and that no person should practice medicine, surgery or midwifery, ²⁶ in any of its branches in this state without first complying with the requirements of the act. Its requirements were to the effect that a person engaged in the practice must obtain a certificate from the board upon a showing either that he was a graduate in medicine or surgery, or a legal practitioner under the laws then in force, or upon such examination before the board as to his qualifications as the board might require, and as to a person practicing midwifery, that she should obtain a certificate from the probate judge of the county in which she resides.

So much of the section defining who shall be regarded as a practitioner of medicine and surgery within the meaning of the act as is necessary to an understanding of the question determined is here set out, and as subsequently amended, the changes being indicated by the words in italics.

"Any person shall be regarded as practicing medicine or surgery within the meaning of this act who shall append the letters M. D. or M. B. to his name, or for a fee prescribe, direct

or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease; provided, however, that nothing in this act shall be construed to prohibit service in case of emergency, or the domestic administration of family remedies": February 27, 1896, 92 Ohio Laws 47.

"Sec. 4403f. Any person shall be regarded as practicing medicine or surgery or *midwifery* within the meaning of this act, who shall use the *words or letters* 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' 'M. B.,' or any other title, in connection with his name, which in any way represents him as engaged in the practice of medicine or surgery or *midwifery*, in any of its branches, or who shall prescribe, or who shall recommend for a fee for like use any drug or medicine, *appliance, application, operation or treatment, of whatever nature*, for the cure or relief of any wound, fracture or bodily injury, infirmity or disease. The use of any of the above-mentioned words or letters, or titles in such connection, and under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine or surgery or *midwifery* in any of its branches, shall be deemed and accepted as *prima facie* proof of an intent on the part of such person to represent himself as engaged in the practice of medicine or surgery or *midwifery*; provided, however, that nothing in this act shall be construed to prohibit service in the case of emergency, or the domestic administration of family remedies: April 14, 1900, 94 Ohio Laws, 200.

The section as amended April 21, 1902 (95 Ohio Laws, 212), is not changed in the particular part under consideration.

In *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168, 46 L. R. A. 334, it was held that osteopathy was not an "agency" within the meaning of the act of 1896, and in *State v. Gravett*, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325, 55 L. R. A. 791, it was held that it was within the meaning of the statute as amended in 1900.

In the opinion in the latter case, Shauck, J., referring to the former case, says (65 Ohio St. 306, 307, 87 Am. St. Rep. 605, 62 N. E. 325, 55 L. R. A. 791):

"The view then urged by the attorney general was that the system of rubbing or kneading the body, known as osteopathy, is an 'agency' within the meaning of the statute; but the interpretation of the statute seemed to invoke the maxim *nos citur a sociis* as an aid in determining the meaning of the word,

²⁸ and our conclusion was that it meant something of like character with a drug or medicine to be administered with a view to producing effects by virtue of its own potency; and that it, therefore, did not include osteopathy. . . .

"It seems quite clear that in its present form the statute affords no proper occasion for the application of the maxim of interpretation by which we were aided in *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168, 46 L. R. A. 334. Careful comparison of the two acts with respect to their definitions of the practice regulated shows that while in the former the legislature intended to prohibit the administration of drugs by persons not informed as to their effect or potency, by the latter it has attempted a comprehensive regulation of the practice of the healing art; so far, at least, as to require the preparatory education of those who, for compensation, practice it according to any of its theories. The comprehensive language of the statute and the purpose which it clearly indicates require the conclusion that osteopathy is within the practice now regulated."

The conceded facts are that the defendant did not recommend or prescribe for the cure or relief of Christ Hehl any drug, medicine, appliance, application or operation, but, on the contrary, that he made no diagnosis or any physical examination, gave him no directions as to food, diet, exercise or any other directions, nor did he make any inquiry as to the nature of the disease with which he was afflicted. The only thing he did was to offer prayer for his recovery. He was called to see Hehl for rheumatism, but called on him but once, and after that gave him what is among the followers of Christian Science ²⁹ known as absent treatment for one week, and at the end of that time Hehl paid him five dollars for his services. The defendant did not have a certificate from the state board of medical registration and examination as required by the statute.

It is contended that the word "treatment" is to be given its meaning as used in the practice of medicine, and that as so read it means the application of remedies to the curing of disease; that a remedy is a medicine or application or process; that process is an action or operation and that prayer for the recovery of the sick is neither.

Technically this may be correct, but the science of medicine has made some advance since the time Macbeth wished to throw physic to the dogs because his doctor could not cure a mind diseased, but told him "Therein the patient must minister to himself."

Nowadays doctors cure imaginary diseases by means that would as easily as Christian Science escape the above definition.

What Christian Science is we do not know. The practice of it is referred to as treatment by its followers. Mrs. Mary Baker G. Eddy in "Science and Health," page 410, says:

"Always begin your treatment by allaying the fear of patients. Silently reassure the patient as to his exemption from disease and danger. Watch the result of this simple rule of Christian Science, and you will find that it alleviates the symptoms of every disease. If you succeed in wholly removing the fear your patient is healed. The great fact that God wisely governs all, never punishing aught but sin, is your standpoint whence to advance and destroy the human fear of sickness. Plead the case in Science ³⁰ and for Truth, mentally and silently.. You may vary the arguments, to meet the peculiar or general symptoms of the case you treat; but be thoroughly persuaded in your own mind, and you will finally be the winner.

"You may call the disease by name when you address it mentally; but by naming it audibly, you are liable to impress it upon the thought. The silence of Christian Science and Love is eloquent. It is powerful to unclasp the hold of disease, and reduce its cause to nothingness.

"To prevent disease or to cure it mentally, let Spirit destroy this dream of sense. If you wish to heal by argument, find the type of the ailment, get its name, and array your mental plea against the physical. Argue with the patient (mentally, not audibly) that he has no disease, and conform the argument to the evidence. Mentally insist that health is the everlasting fact and sickness the temporal falsity. Then realize the presence of health, and the corporeal senses will respond, 'So be it!'"

If its followers call it treatment they ought not to be heard to say it is not. Dr. O. W. Holmes, Med. Ess., says: "Disease is to be treated by anything that is proved to cure it."

The statute of 1896, as we have seen, had been held by this court not to comprise the practice of osteopathy and by a lower court (Evans v. State, 9 Ohio Dec. 222, 6 Ohio N. P. 129) not to apply to Christian Science. So that the use of the words "of whatever nature" in the amendment are quite significant, and we have no doubt the legislative intent was to bring within this definition every person who for a fee prescribes or recommends a cure for disease, even ³¹ though the cure is to come not from himself but, through his intercedence, from God. In

Illinois the legislature when it enacted "any person shall be regarded as practicing medicine, within the meaning of this act, who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury or deformity of another," thought it necessary to exclude Christian Science by providing that nothing in this section shall be construed to apply to any person who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy.

The next contention is that the statute interferes with defendant's right to worship God according to the dictates of his conscience. No specific provision of the constitution is referred to. Section 7 of our bill of rights provides "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, . . . nor shall any interference with the rights of conscience be permitted."

It is to be observed that the statute does not prohibit the prescribing or recommending the treatment except for a fee, and we are not advised that it is a part of defendant's religion to exact a fee as well as to pray. But if the inhibition of the statute tends to the public welfare and is not obnoxious on other grounds it is not within this provision of the bill of rights. In *Bloom v. Richards*, 2 Ohio St. 387, 392, Thurman, J., says: "Acts evil in their nature, or dangerous to the public welfare, may be forbidden and punished, though sanctioned by one religion, and prohibited by another; but this creates no preference ³² whatever, for they would be equally forbidden and punished if all religions permitted them. Thus, no plea of his religion should shield a murderer, ravisher or bigamist; for community would be at the mercy of superstition, if such crimes as these could be committed with impunity, because sanctioned by some religious delusion."

In *Reynolds v. United States*, 98 U. S. 145, 164, 25 L. ed. 244, after showing historically how religious freedom came to be guaranteed by amendment to the constitution of the United States, Chief Justice Waite considers what is meant by religious freedom and concludes: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."

This brings us to the question whether the act, in so far as its application to Christian Science is concerned, is a valid exercise of the police power. The term "police power," it has been

said, is incapable of exact definition. "It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion": Freund on Police Power, sec. 3.

In *Parks v. State*, 159 Ind. 211, 220, 64 N. E. 862, 866, 59 L. R. A. 190, Gillett J., gives the following list of subjects that have been dealt with under this power:

"Under this power various burdens are imposed: Criminals are deprived of their liberty; the implements of crime are destroyed; vice and pauperism are controlled; noxious trades are regulated; nuisances are suppressed; children are required to attend school; the property of infants and persons non compos is placed in the control of others; the construction ³³ of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employes is to be performed; the hours of work, in employments deleterious to the health, limited; the employment of children in factories prohibited; pure food laws are enacted; physicians, dentists and druggists are licensed; and so the list might be almost indefinitely extended by specific instances of authorized legislative regulations, enforcing the social compact, for the protection of life, health, morals, property and the general weal of the community, until we perceive that definition is impossible and that the whole matter of the legislative sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left, as the federal supreme court has declared, to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require."

The earlier decisions were to the effect that the only question for judicial consideration was whether a condition for legislation existed; if it did the matter was entirely within the discretion of the legislature. A resort to the polls was the only road to relief from abuse or mistake: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. But the later cases are that the power is subject to express state constitutional limitations and to the inhibition of the fourteenth amendment to the constitution of the United States against any state to deprive any person of life, liberty or property without due process of law, and to deny to any person within its jurisdiction the equal protection ³⁴ of the laws, and to the implied limitation that every exercise of the power must be reasonable: Freund on Police Powers, sec. 63; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E.

390, 2 L. R. A. 81; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, 41 L. ed. 256; *Wisconsin etc. R. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. Rep. 115, 45 L. ed. 194; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. Rep. 18, 49 L. ed. —.

That the practice of medicine may be regulated by legislation has been decided in every court in which the question has arisen. In the leading case, *Dent v. West Virginia*, 129 U. S. 114, 122, 9 Sup. Ct. Rep. 231, 233, 32 L. ed. 623, Mr. Justice Field says:

“The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure, them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to ³⁵ such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

“Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued

by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified."

And again: "We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body ³⁶ designated by the state as competent to judge of his qualifications."

But it is said the offering of prayer to God for the recovery of the sick is not against public health or public morals or public safety or public welfare. Admitted. But is that a correct statement of the case? If the defendant prayed for the recovery of Hehl that was the treatment he gave him for the cure of his rheumatism and for which Hehl paid him. He was practicing healing or curing disease. To assume that legislation may be directed only against the administering of drugs or the use of the knife is to take a too narrow view. The subject of the legislation is not medicine and surgery. It is the public health or the practice of healing. The state might make it an offense, as has been done in New York (*People v. Pierson*, 176 N. Y. 201, 98 Am. St. Rep. 666, 68 N. E. 243, 63 L. R. A. 187) for anyone to omit to furnish medical attendance to those dependent upon him, and at the same time leave him at liberty to die in any manner he may choose. But this is not all. While the state may not deem it wise to go to the extent of requiring the individual to avail himself of the services of a physician, yet it may not wish to hasten his death and so to transfer to itself the burden of supporting those dependent upon him by making it possible for him to employ an empiric. Again, where there is an infectious or contagious disease the public welfare may be vitally affected by a failure promptly to recognize it, and so the state is interested in permitting to practice the art of healing only those possessing recognized qualifications. So that, regarding disease rather than the treatment of it as the subject of the legislation, it is not necessary that the ³⁷ statute be preventive of particular practices, but it may make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications.

It is next contended "that Christian Science is a recognized system or school of healing, and that the statute is unconstitutional, on the ground that it discriminates against Christian Science, or in favor of certain schools of medicine; that different requirements are made of those who use drugs or medicines, of surgeons, and of osteopaths who use no medicines or drugs, but that the Christian Scientist who uses nothing must take the same examination as the regular practitioner, in other words, must understand the use of drugs and medicines, none of which, according to his system, does he ever use. That under the statute the osteopath is given a certificate to practice the healing art according to his system of treatment, without passing an examination before the state board in the subjects of pathology, chemistry and therapeutics, the principles and practice of medicine and surgery. That Christian Science entirely excludes drugs and all material methods of treatment, and relies solely upon prayer as a means for the relief or cure of the sick. Upon what possible theory of justice and equality can the Christian Scientist be required to pass an examination in a half dozen different subjects, which are not required of the osteopath, when these subjects have no relation to the practice of Christian Science and are even further removed from that method of the healing art than they are from the practice of osteopathy? Neither the law nor the rules of the board of medical registration and examination contain any ³⁸ provisions for ascertaining the attainments of the Christian Scientist who might apply for a certificate to practice his system of healing. The record shows that there is no member of the board qualified to examine a Christian Scientist and no committee or other means for examination has been provided."

If we are correct in the conclusion that disease, and not the method of its treatment, is the subject of the legislation, then it is putting the cart before the horse to say that every school of healing must be recognized. That the legislature, in its wisdom, might prescribe a uniform examination, we do not doubt, and that it may recognize one school without recognizing all, is also true, if the recognition be in the exercise of proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized or a discrimination against other schools: *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411.

The act under consideration in *State v. Gravett*, 65 Ohio St. 289, 87 Am. St. Rep. 605, 62 N. E. 325, 55 L. R. A. 791, was held void as discriminating against osteopaths because in order to obtain a certificate to practice, limited so that they might not prescribe drugs or perform surgery, they were required to hold diplomas from schools requiring a longer period of study than was required of those for unlimited certificates. The present act, or sections 4403c (94 Ohio Laws, 198) and 4403f (95 Ohio Laws, 212) make no such discrimination. It provides that no person shall practice medicine and surgery or midwifery without first complying with the requirements of the act. Then it exempts persons entitled ³⁹ to practice at the time the act is to take effect, prescribes what evidence of general learning the applicant shall present as a condition to his being admitted to the examination, and then provides that each applicant shall be examined in certain specified subjects and that he shall be examined in the materia medica and therapeutics and the principles and practice of medicine, of the school of medicine in which he desires to practice, by the member or members of the board representing such school, and if he passes an examination, satisfactory to the board, it shall, upon payment of the prescribed fee, issue to him a certificate, which when left with the probate judge for record shall be conclusive evidence that its holder is entitled to practice medicine or surgery in this state. It further provides: "That nothing in this act shall be construed to prohibit services in a case of emergency and the domestic administration of family remedies; and this act shall not apply to any commissioned medical officer of the United States army, navy or marine hospital service, in the discharge of his professional duties, nor to any legally qualified dentist when engaged exclusively in the practice of dentistry," nor to any physician or surgeon who is a legal practitioner in another state, nor to any osteopath who shall pass an examination in certain subjects, and then provides for the appointment of a committee to examine applicants to practice osteopathy and prescribes the qualifications for admission. We fail to find anything in the act that discriminates against Christian Science. It does not provide for a special examination and limited certificate for the Christian Science practitioner, but he may obtain a certificate to practice medicine ⁴⁰ upon the same conditions as any other person, and there is nothing in the act requiring him to use the knowledge after he acquires it.

In response to an inquiry from the bench as to what, respecting the theory of medicine, a Christian Scientist could be examined, counsel suggested that he might be examined as to his ability to pray. But silent treatment is recommended as likely to be more efficacious.

To admit that a practitioner may determine what treatment he will give for the cure of disease, and that the state may examine him only respecting such treatment, would be to defeat the purpose of the statute and to make effective legislation of this character impossible.

If the recent statute is too comprehensive the remedy is with the legislature.

The conclusion reached is supported by *State v. Buswell*, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68, and the following recent decisions throw more or less light upon such legislation: *People v. Blue Mountain Joe*, 129 Ill. 370, 29 N. E. 923; *Williams v. People*, 121 Ill. 84, 11 N. E. 881; *People v. Gordon*, 194 Ill. 560, 88 Am. St. Rep. 165, 62 N. E. 858; *Bragg v. State*, 134 Ala. 165, 32 South. 767, 5 L. R. A. 925; *State v. Bair*, 112 Iowa, 466, 84 N. W. 432, 51 L. R. A. 776; *State v. Wilcox*, 64 Kan. 789, 68 Pac. 634; *Meffert v. Medical Board*, 66 Kan. 711, 72 Pac. 247; *State v. Bohemier*, 96 Me. 257, 52 Atl. 643; *People v. Reetz*, 127 Mich. 87, 86 N. W. 396; *State v. Biggs*, 133 N. C. 729, 46 N. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731, monographic note; *State v. Heath (Iowa)*, 101 N. W. 429.

The exceptions are sustained.

Shauck, Price and Spear, JJ., concur.

The Christian Science method of treating the sick as the practice of medicine is discussed in the monographic note to *State v. Biggs*, 98 Am. St. Rep. 752-756.

ORLOPP v. SCHUELLER.

[72 Ohio St. 41, 73 N. E. 1012.]

GARNISHMENT.—An Executor or Administrator cannot, in advance of an order of distribution, be charged as garnishee in respect to property or funds in his hands belonging to an heir or legatee; and this rule is not changed by section 5531 of the Revised Statutes of Ohio. (p. 584.)

A. M. Johnson and Henry Elliston, for the plaintiff in error.

Gumble & Gumble, for the defendant in error.

⁵⁵ CREW, J. In the present case the precise question presented by the record may be stated thus: Can an administrator with the will annexed, before an order of distribution is made of the estate he represents, be charged as garnishee in respect to property or funds in his hands that may ultimately belong to ⁵⁶ one named in said will as residuary legatee? The clear weight of authority undoubtedly is that executors and administrators cannot be thus charged. Such has been the almost uniform holding of the courts of last resort except in those jurisdictions where the rule has been changed by express statutory enactment. And this rule has thus been generally so held and applied by the courts, whether it was sought to charge the executor or administrator on account of a debt owing from the estate to the defendant in the attachment suit, or on account of the latter's being entitled to a distributive share of the estate as heir or legatee: 14 Am. & Eng. Ency. of Law, 829. Indeed, so far as our examination of the authorities has enabled us to discover, the only state in which the garnishment of an executor or administrator is allowed before final settlement or order of distribution, in the absence of express statutory authority therefor, is the state of Indiana. It was held by the supreme court of that state in 1856, in the case of Stratton v. Ham, 8 Ind. 84, 65 Am. Dec. 754, that the unascertained distributive shares of a decedent's estate in the hands of the executor, are effects liable to the process of garnishment. This case has been much criticised and its doctrine almost universally repudiated in other jurisdictions. It was said of it by Lyon, J., in Case Threshing Machine Co. v. Miracle, 54 Wis. 299, 11 N. W. 580: "This is an exceptional case, and in a learned and elaborate note appended to it numerous cases are cited and the unsoundness of the decision demonstrated on principle and by authority."

It would seem to us but reasonable, therefore, that a rule so universally recognized by text-writers and so firmly established by judicial decisions as is the ⁵⁷ rule that an executor or administrator holding in his representative capacity cannot, in the absence of express statutory authorization, in advance of an order of distribution, be held or charged as garnishee in respect to property or funds in his hands belonging to an heir or legatee, should not now, in the absence of statutory requirement, or other cogent and compelling reason, be disregarded or disturbed by us.

That the general rule of law is as above stated, counsel for defendant in error admit. But they contend that in Ohio the right is given by statute to so charge an executor or administrator, and that the existence of such right is shown and recognized by section 5531, Revised Statutes, which section is as follows:

"Section 5531. The service of process of garnishment upon the sheriff, coroner, clerk, constable, master commissioner, marshal of a municipal corporation, or other officer having in his possession any money, claim or other property of the defendant, or in which the defendant has an interest, shall bind the same from the time of such service, and shall be a legal excuse to such officers, to the extent of the demand of the plaintiff, for not paying such money or delivering such claim or property to the defendant, as by law or the terms of the process in his hands he would otherwise be bound to do."

The circuit court in its opinion in the present case says: "Were it not for the section above referred to (section 5531), we are not prepared to say that a legacy could be attached especially if the amount was unascertained." But they say: "We are of the opinion that under section 5531 an undetermined ⁵⁸ legacy either in the hands of an administrator or executor may be garnisheed; that administrators and executors are included under the designation of other officer in the above section." Upon this interpretation of this statute the circuit court predicated its judgment.

It will be observed that this statute does not mention executors and administrators nor does it in terms provide or prescribe who may be served with garnishee process; it undertakes only, as stated in its title, to define the effect of service of the process of garnishment upon public officers. Therefore to give to this section the construction and interpretation placed upon it by the circuit court is, we think, to thereby unduly extend its scope

and give to it a potential effect neither warranted by its purpose and provisions nor intended by the legislature. Whether executors and administrators can in any proper sense be regarded as officers may well be doubted. Obviously they are not public officers as are all those who are specifically named in section 5531, and the obligations and duties devolving upon them in their representative capacity are wholly dissimilar and unlike the duties to be performed by the officers so named and designated. But if it be conceded that executors and administrators fall within the designation "other officer" as found in said statute, it by no means follows that in an action against the heir or legatee, the executor or administrator may, in advance of an order of distribution and while the estate remains unsettled, be held and charged as garnishee in respect to property in his hands unadministered. So long as the estate remains unsettled, or at least until order of distribution is made, the property held by an executor or administrator ⁵⁹ as such, is in the custody of the law and does not vest in, or become the property of the heir or legatee. Until such time the executor or administrator is not the debtor of the heir or legatee, nor is it certain that he is the custodian of any property belonging to him. In the due course of administration the debts, costs of administering the trust, and specific legacies, are to be first paid, and until final settlement or order of distribution, there is not such certainty of fact that the executor or administrator holds or has "in his possession any money claim or property belonging to the heir or legatee, or in which he has an interest" as would warrant or justify holding the executor or administrator liable as garnishee even under an answer by him showing that there would probably be something due the heir or legatee upon the final settlement of the estate. The heir or legatee has no present right to, or interest in, the property, and whether there will be any amount due him on final settlement and order of distribution is matter of contingency.

When we consider, then, that to give section 5531 the force and effect claimed for it by counsel for defendant in error and allowed to it by the circuit court, is to abrogate a well and firmly established rule of law, presumably known to the legislature at the time of the enactment of said section, we think we may well conclude that if the legislature had intended thereby to provide for and authorize the attachment of, and to allow garnishee process to issue against, executors and administrators, it would have named them in the statute and would not have

left its purpose and intention in that behalf to implication, or to be discovered only through the medium of ⁶⁰ judicial interpretation. The fact that the legislature did not specifically name executors and administrators in section 5531, or in apt language designate or describe them, clearly shows, we think, an absence of intention on its part to include them in its provisions.

The judgment of the circuit court is reversed and garnishee discharged.

Davis, C. J., Shauck and Spear, JJ., concur.

Funds in the Hands of an Executor or administrator are not subject to garnishment by the creditors of the decedent before a final distribution of the estate has been ordered by the court: Hudson v. Saginaw Circuit Court, 114 Mich. 116, 68 Am. St. Rep. 465; Brewer v. Hutton, 45 W. Va. 106, 72 Am. St. Rep. 804. Compare Stratton v. Ham, 8 Ind. 84, 65 Am. Dec. 754.

STEVENS v. CINCINNATI TIMES-STAR COMPANY.

[72 Ohio St. 112, 73 N. E. 1058.]

LOTTERY—Chance—Calculation and Certainty.—The element of chance in a lottery is not incompatible with the presence of an element of calculation or even certainty; if the dominating, determining element is one of chance, that element gives character to the whole scheme. (pp. 591, 592.)

GAMING.—Bets and Wagers defined and distinguished. (pp. 592, 594.)

LOTTERY—Guessing on the Result of an Election.—A scheme whereby people are invited to pay a certain sum for a subscription to a newspaper and the privilege of guessing the number of votes that will be cast for a specified public officer at the coming election, the guessers coming nearest to the actual vote to receive money prizes, is within the condemnation of the Ohio statutes against lotteries and schemes of chance. (p. 593.)

ILLEGAL TRANSACTIONS—Relief of Parties.—If the parties to an illegal transaction are in *particeps criminis*, the law will aid neither to enforce the contract while executory, nor, where executed, will it aid either to place himself in *statu quo* by rescission, but will, in both cases, leave the parties where it found them. (p. 595.)

ILLEGAL TRANSACTION—Recovering Back Money.—So long as illegal transactions remain wholly unexecuted, the one parting with his money may repent, abandon his contract, and recover back the money paid. (p. 595.)

EQUITY PRACTICE.—To Maintain a Suit by One for the Benefit of himself and others, there must be a community of interest as well as a right of recovery by reason of the same essential facts. (p. 596.)

LOTTERY—Relief in Equity—Suit by One for Benefit of All.—Where some four hundred thousand people have each paid fifty cents to a newspaper company at its invitation to participate in a guessing contest which amounts to a lottery, one of their number cannot invoke the jurisdiction of equity and ask for an injunction and a receiver on the ground that he has a right to represent and appear for the others, that they are numerous, that the fund equitably belongs to them all, and that therefore he has a right to sue in equity for the benefit of all. (p. 596.)

J. P. Bradbury and E. D. Davis, for the plaintiff in error.

Thornton M. Hinkle, Frederick W. Hinkle, Pogue & Pogue and Alexander Murray, Jr., for the defendants in error.

113 **SPEAR, J.** Plaintiff's actions below against these several defendants were begun in the superior court of Cincinnati, October 20, 1902. The petition in the first case named is as follows:

"The plaintiff, Samuel A. Stevens, brings this action on behalf and for the benefit of himself and all others similarly situated and interested.

"Plaintiff says that the defendant is a corporation organized and transacting business under the laws of the state of Ohio.

"Plaintiff alleges that he delivered to the defendant company the sum of fifty (50) cents, upon a gaming and lottery contract under and pursuant to the terms of which contract, sums of money, uncertain in amounts, are offered as prizes, conditional and wholly dependent upon the happening of the uncertain event that the persons making the first, second, third and other nearest correct guess or guesses of the exact total vote cast for Secretary of State of Ohio, at the November election, 1902, shall be entitled to receive said first, second, third and other prizes; that under the terms of said contract all persons making a guess were required to deposit with said defendant the sum of fifty (50) cents; that twenty-four (24) cents of said sum is retained by said defendant as the price of subscription to a newspaper belonging to said defendant; that the remaining twenty-six
114 (26) cents of said sum is deposited with the sum to be paid out in prizes, as aforesaid; that under the terms of said contract, the person making the nearest guess, as aforesaid, shall receive one-tenth (1-10) of said prize fund deposited as aforesaid; to the second nearest, one-twentieth (1-20) of said fund as

aforesaid; to the third nearest as aforesaid, one-fortieth (1-40) of said fund; to the fourth and fifth nearest each one-eightieth (1-80) of said fund as aforesaid; to the one hundred next nearest one-fifth (1-5) of said sum as aforesaid; the same being divided equally between said one hundred next nearest; to the two hundred next nearest one-fifth (1-5) of said sum, the same to be divided equally; to the four hundred next nearest, one-fifth (1-5) of said sum, the same to be divided equally; to the one thousand next nearest one-fifth (1-5) of said sum, the same to be divided equally.

“That under the terms of said contract there were offered in all seventeen hundred and five prizes; that the amount of said prizes is conditional upon the happening of the uncertain event, to wit, the number of persons who may make a guess; that all and each of said prizes offered, as aforesaid, is conditional and wholly dependent upon the uncertain event that the guess of plaintiff or some other person who has paid defendant money and made a guess in whose behalf and for whose benefit the plaintiff prosecutes this suit, is nearer the exact total number of votes cast, as aforesaid, than the guesses of other persons who have likewise entered into said gaming contract with defendant.

“Plaintiff alleges that the defendant company received said sum of fifty (50) cents from plaintiff ¹¹⁵ to the plaintiff's use, and that there is now due the plaintiff from defendant the sum of fifty (50) cents.

“Plaintiff further alleges that he is one of a large number of persons who have delivered money to the defendant under the terms and conditions of said gaming and lottery contract, and that all of said persons have delivered money to said defendant under the same terms and conditions under which plaintiff delivered said sum of fifty (50) cents to said defendant; that each and all of said persons and plaintiff have a general interest in and common right to the money or fund thereby accumulated in the hands of the defendant company; that said defendant company, in pursuance of said gaming and lottery contract, has accumulated a large fund of money amounting to about two hundred thousand dollars or more, that said fund is composed entirely of payments and contributions by the plaintiff and all the other persons in whose behalf this suit is prosecuted; that said fund equitably belongs to all said persons who have made guesses and paid money to the defendant under said gaming contract; that the persons who have made said guesses and entered into said contract with the defendant are very numerous,

and their names are unknown to plaintiff, and it is impracticable to bring them before the court.

"Plaintiff alleges that the defendant, unless enjoined from so doing, will dissipate said fund by distributing the same as prizes, and to pay the expenses of continuing of said unlawful contest or otherwise, and that said fund will be wholly lost to this plaintiff and the class represented by him, and for whose benefit he sues, which will cause to them and each of them, irreparable loss and damages and occasion a ¹¹⁶ multiplicity of lawsuits, and the plaintiff and each of said persons interested in said funds as aforesaid are without adequate remedy at law.

"Wherefore plaintiff prays that it be ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of fifty (50) cents; that each member of the class on whose behalf this action is prosecuted recover from the defendant the amount paid to said defendant; that the defendant be declared a trustee of the fund hereinbefore mentioned, and be enjoined from dissipating it by distributing it as prizes, and by way of expenses or otherwise; that a full and complete accounting of said fund be ordered; that a receiver be appointed to take possession of said fund; that a referee be appointed to determine the names of the aforementioned class, and the amount paid defendant by each, and for such other and further relief as this court may deem proper."

That against the Commercial-Tribune differs from the other in the allegation respecting the subscription and the event on which the prizes are to be paid, the amounts thereof, and the source from which payments are to be made. The uncertain event is the total vote to be cast for the Secretary of State of Indiana at the election November 4, 1902, and the prize alleged to be promised to be given to the one coming nearest a correct guess of the total vote the sum of five thousand dollars, and others in the order of nearness down to two dollars, there being offered in all fourteen hundred and ninety prizes, all to be paid from the company's own funds.

The uncertain event named in the petition against the Enquirer Company is the total vote cast for the ¹¹⁷ Secretary of State of Ohio at the election November 4, 1902, and there is no allegation respecting a subscription. The one making the nearest a correct guess of the total vote to be awarded twelve thousand dollars, and others in the order of nearness down to five dollars, there being offered in all four thousand and eighty-seven prizes; these also to be paid from the company's funds.

To these several petitions demurrers were filed, of which the following is a copy: "The defendant demurs to the petition for that: 1. The court has no jurisdiction of the subject of the action; 2. The petition does not state facts sufficient to constitute a cause of action."

With the petitions there were also filed motions for the appointment of a receiver and a referee.

Upon hearing the motions were overruled and the demurrers sustained. Thereupon, the plaintiff not desiring to further plead, the petitions were severally dismissed and judgment entered for defendant. Error being prosecuted to the general term of the superior court, the judgments of the special term were affirmed. The plaintiff brings error.

¹⁴⁵ It will be noted that the allegation against the Times-Star respecting the use which was to be made of the amount contributed is that twenty-four cents of the fifty cents paid was for a subscription to the newspaper, and that the remaining twenty-six cents were to go into a fund which, along with similar payments from others, was to constitute the fund from which the prizes were to be paid, whereas the prizes by the other companies were to be paid from their own funds, and no subscription to either newspaper was made. But it is believed that there is no essential difference in the questions of law presented by the several petitions. Hence it has ¹⁴⁶ not been found important to incorporate all of them in full in the record here.

To maintain his case the plaintiff must establish that the scheme shown by the petition involves a lottery, or a gaming contract such as is made unlawful either by the statutes of Ohio or at common law, and that he is entitled to relief by a court of equity, such as is demanded by his petition.

1. Is the project a lottery, or an unlawful gaming scheme of any kind? Under the head of "Lotteries" our statutes, sections 6929, 6930 and 6931, interdict the publishing in any way an account of any lottery or scheme of chance of any kind or description, stating when or where the same is to be drawn, or the prizes therein, or in any way giving publicity to such lottery or scheme of chance; the vending, or in any way disposing of any ticket, order or device of any kind, for or representing any number of shares, or any interest in any lottery or scheme of chance of any kind or description; the carrying on or promoting of any scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known. Under the head of "Gaming and Betting," section 6938 declares un-

lawful the making of any bet or wager for any sum of money, or other property of any value, and the following section declares unlawful the making of any bet or wager on the result of any election held under the laws of this state, etc. Giving further effect to the spirit of these provisions, the statute (sections 4269 to 4271) declares that all promises, agreements, etc., the whole or any part of the consideration of which is money or any other valuable thing, won or lost, laid, staked, or betted, ¹⁴⁷ at or upon any game of any kind, or under any denomination or name whatsoever, or upon any wager, shall be absolutely void; money, or other thing of value, may be recovered back from the winner by action commenced within six months, and one who expends any money, or thing of value, to procure any chance, or any interest therein, on account of any scheme of chance, may sue for and recover from the person receiving such money, etc.

Many definitions of the word "lottery" are found in the books. An often quoted definition is given by Folger, J., in *Hull v. Ruggles*, 56 N. Y. 424, which is: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." "A sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks": *American Cyc.* "A lottery," says the supreme court of Michigan in *People v. Elliott*, 74 Mich. 264, 16 Am. St. Rep. 640, 41 N. W. 916, 3 L. R. A. 403, "is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished."

However, it should not be concluded that the term "lot or chance" implies that if any element of certainty or skill enters into the scheme it therefore relieves it of its character as a lottery, or scheme of chance. Chance is something that befalls; the result of unknown or uncertain forces or conditions. An intelligent definition is given in 6 *Cyclopedia*, 890, thus: ¹⁴⁸ "Possibility, hazard, risk, or the result or issue of uncertain and unknown conditions or forces, neither understandingly brought about by one's act, nor pre-estimated by one's understanding." This element of chance is not at all incompatible with the presence of an element of calculation, or even certainty. That principle is illustrated in *Horner v. United States*, 147 U.

S. 449, 13 Sup. Ct. Rep. 409, 37 L. ed. 237, where the court say: "Although by the bonds in question, Austria attempted to obtain a loan of money, she also undertook to assist her credit by an appeal to the cupidity of those who had money, and offered to every holder of a bond a chance of obtaining a prize dependent upon lot or chance, the element of certainty going hand in hand with the element of lot or chance, but the former not destroying the existence or effect of the latter." It is easily within bounds to conclude that if the dominating, determining element is one of chance, that element gives character to the whole scheme.

Our statute as to gaming and betting has been cited. A bet is: "An agreement between two or more, that a sum of money, or a valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contracting parties, according to the result of the trial of chance or skill, or both combined; a wager; to put to hazard a sum ascertained upon a future happening of some event then uncertain; the thing or sum wagered": 5 Cyc. 684. A wager is: "A bet; a contract by which two ¹⁴⁹ parties or more agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening, or not happening, of an uncertain event. A contract upon a contingency by which one may lose, but cannot gain, or the other must gain, but cannot lose, is a wager. . . . A wager is something hazarded on the issue of some uncertain event; a bet is a wager, although a wager is not necessarily a bet": 2 Bouvier's Law Dictionary, 15th ed., 793.

With the provisions of statute and these rules and definitions before us, what conclusion follows? The petition in the first-named case shows that the plaintiff paid fifty cents for a subscription to a newspaper and for the privilege of guessing or estimating the total number of votes that would be cast for the Secretary of State of Ohio, at the coming election, November 4, 1902, the subscription to cost twenty-four cents and the guess to cost twenty-six cents, and in case his guess should be superior to all those coming within the terms of the offer extended to all, or equal to those coming within a lower class with the plaintiff, he was to receive a money prize, to be paid to him by the newspaper company, varying in amount from one-tenth of the whole sum contributed by the guessers, to a sum equal to one-fifth of

one-eightieth of the whole sum so contributed, all depending upon the nearness of his guess to the actual number of votes cast for the officer named and the nearness of the other guesses to that total vote. It was the opinion of the learned judge who heard the case at the special term that these guessing contests were not within the condemnation of the statutes of Ohio against lotteries, gambling, wagering, or betting: 13 Ohio Dec. 235.

In a later case, that of ¹⁵⁰ Hobing v. Enquirer Co., heard in the common pleas of Hamilton county, wherein the plaintiff, a guesser, sought to recover judgment upon an allegation that he had made the correct estimate and was therefore entitled to the prize of ten thousand dollars, that court (Littleford, J.) held that the alleged contract was a wager between the plaintiff and defendant, was in violation of section 4269, Revised Statutes, and that, while plaintiff might, under this statute, recover back his fifty cents in a proper court, yet, the common pleas not having jurisdiction of the amount, the petition was dismissed. By the opinion in this later case (2 Ohio N. P. Rep., N. S., 205), we learn that, although the general term affirmed the judgment of the special term, two of the judges (one of them being the learned judge of the common pleas at the time sitting as a member of the general term) did not concur in the holding of the special term respecting the character of the contract.

Which, if either, of these views is correct? It would seem not difficult to reach the conclusion that the project was, in essence and reality, a scheme of chance. The term "guess" itself imports uncertainty. It is at best a conjecture, a random judgment, and a guesser is one who gives an opinion without means of knowing. It is true that one acquainted with the results of the elections of the state in previous years and educated in politics would have some advantages over one ignorant in those respects, yet it must be apparent even to a casual observer, that the result would depend upon so many uncertain and unascertainable causes, that the estimate of the most learned would be after all nothing more than a random and ¹⁵¹ undecisive judgment. In the sense above indicated there is an element of skill, possibly certainty, involved, but it is clear that the controlling, predominating element is mere chance. It was a chance as to what the total vote would be; it was equally a chance as to what the guesses of the other guessers would be. Whether or not the transaction includes the quality of a bet is not so certain. Its determination is not essential to a proper disposition of this case. We incline to think, however, that it does, but are unable

to agree with the conclusion that the bet is between the plaintiff and the defendant.

A bet implies that what one party gains the other loses, and vice versa. The defendant in the present case loses nothing, whatever the outcome; nor does it gain, whatever the outcome. It is a matter of indifference to it who wins the prizes, whether this plaintiff or any of the other contributors. Not so with the contributors between themselves. If A should win the first prize, for instance, B could not. If the transaction were a bet, therefore, it would seem to be between this plaintiff and all the other guessers, and in this view the defendant would be a mere stakeholder. We are not concerned to inquire what the law of other jurisdictions may be, and hence do not take the pains to discuss, or even cite, the mass of authorities cited by counsel. They will be found in the reporter's introduction, to which any curious inquirer, should there be such, is referred. It suffices that, under the laws of Ohio, these guessing contests were, all of them, unlawful. Not that there is any belief or claim that the several defendants would, either of them, fail to conduct the ascertainment of the successful guessers and the awarding ¹⁵² and payment of the prizes with entire impartiality and fairness, but the schemes themselves must be held to be within the condemnation of our statute. The vice of the project lies in the payment of money for the opportunity to win more money by a scheme of chance. It is not simply the winning of prizes that the statute seeks to inhibit. There may be such contests in which there is no element of gambling. If the contestant, or player, risk nothing, as where the prizes are offered in school by the teacher to scholars for the best essay, or in society by the host or hostess as an inducement to guests to attend social gatherings and indulge in games innocent in themselves, the winners to receive prizes as matter of grace and favor, and as reward for skill, it is not considered that the function embraces any gambling element, whatever other objectionable features, if any, are present; but where the players make up by a payment of money, or other thing of value, a purse which affords the prizes, as in the ordinary raffle, the game is a gambling game, whether skill enters into the result or not.

All highly civilized peoples recognize the evils to society arising from the encouragement of the gambling spirit, and it is for the purpose of discouraging this vice and preventing the spread of it that laws are passed in other states like the Ohio statutes to punish and prohibit. Such laws are and should be interpreted

and enforced by our courts in a way calculated to secure the object sought. A familiar case is that of *Hooker v. DePalos*, 28 Ohio St. 251, condemning and holding unlawful a scheme known as a "gift enterprise." This is an instructive case, and the vice which is ¹⁵³ condemned by the court is the same which inheres in the scheme present in the case at bar.

2. Is the plaintiff entitled to relief in a court of equity?

He seeks to invoke the jurisdiction of the equity court, and asks an injunction and a receiver, on the ground that he stands in a representative capacity, having the right to represent and appear for all the other persons who have delivered money to the defendant under the same terms and conditions under which plaintiff delivered his fifty cents; that such persons are numerous; that each and all having a general interest in and common right to the money or fund thereby accumulated, the fund equitably belongs to all who have made guesses and paid money to the defendant, and hence plaintiff has the right to maintain a suit in equity for the benefit of all. Is his position tenable? This contest we have found to be an illegal enterprise. It is apparent that the inducement to the guessers was not to subscribe for a newspaper, but to get a prize. They, therefore, are each and every one of them *particeps criminis* in an illegal transaction. The general rule applicable to such a situation is that the law will aid neither party to enforce the contract while executory, nor, where executed, will it aid either party to place himself in *statu quo* by a rescission, but will, in both cases, leave the parties where it finds them. This well-established rule has been varied by changes in our statute, as we have seen, which allows money won by gaming or betting to be recovered at law by the loser. But these are exceptions, and are to be confined to the particular cases, and relief to be obtained by the particular methods indicated by the ¹⁵⁴ statute.

While this is true it is also true, independent of the statute, that so long as the illegal acts remain wholly unexecuted, the party parting with his money may repent, abandon his contract, and recover back the money paid, the law's aim being to prevent wrongdoing by encouraging such repentance and abandonment: *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Cowles v. Raguet*, 14 Ohio, 38; *Thomas v. Cronise*, 16 Ohio, 54; *Hooker v. DePalos*, 28 Ohio St. 251; *Cooper v. Rowley*, 29 Ohio St. 547; *Kahn v. Walton*, 46 Ohio St. 195, 20 N. E. 203. The plaintiff claims to have thus repented. Well and good so far as it goes. But how about the other guessers? Have they repented? Did

they, when this suit was commenced, want their alleged contract rescinded? The petition shows that they were very numerous; that their names are unknown to the plaintiff, and it is impracticable to bring them before the court. This is a conclusive showing, it appears to us, that he is wholly without information respecting a condition essential to the maintenance of a joint suit in equity. Indeed, the presumptions are against the plaintiff's claim. These people had paid a small amount of money for a chance to receive a much larger amount, and they would be presumed to remain of the same mind until the contrary is shown. The case is wholly dissimilar, in its presumptions, from one to which it is sought to be likened, viz., where a property owner seeks to avoid payment of an alleged illegal assessment. In such case it might naturally be presumed that the property owners would all be of the same mind in an endeavor to avoid an injustice.

The rule is uniform that, in order to maintain a suit by one for the benefit of himself and others, there ¹⁵⁵ must be community of interest as well as a right of recovery by reason of the same essential facts: *Armstrong v. Treasurer*, 10 Ohio, 235; *Ohio v. Ellis*, 10 Ohio, 456; *Trustees v. Thomas*, 51 Ohio St. 285, 295, 37 N. E. 523; *Duncan v. Willis*, 51 Ohio St. 433, 38 N. E. 13. These elements are lacking in the case made by the plaintiff's petition. In passing, also, we should take note of the fact that there would have followed as a necessity from the sustaining of plaintiff's contention, the ascertainment by the court through its receivers of the names and addresses of the four hundred thousand contributors, and the distribution to each of his half-dollar, reduced by his proportion of the probable fees, allowances and costs, and when this is considered it must be apparent that the magnitude and difficulties of the task would be immeasurably greater than any good which the painful working out of the remedy would bring about.

The superior court properly sustained the demurrer to the petition as an appeal to the equity side of the court, and, having no jurisdiction of the law case respecting the amount, it properly dismissed the case. Its judgment is, therefore, affirmed.

Davis, C. J., Shauck, Price, Crew and Summers, JJ., concur.

To Constitute a Lottery, there must be a prize offered, and the payment of something for a chance to obtain it: *State v. Nebraska Home Co.*, 66 Neb. 349, 103 Am. St. Rep. 706. A scheme for the distribution of a sum of money and a quantity of cigars among the purchas-

ers of certain brands most closely estimating the number of cigars of all brands upon which taxes should be collected during a specified month, although the distribution may not depend exclusively upon chance, is a lottery: See the note to *State v. Nebraska Home Co.*, 103 Am. St. Rep. 711. Consult, also, *De Florin v. State*, 121 Ga. 593, 104 Am. St. Rep. 177, and cases cited in the cross-reference note thereto.

PENNSYLVANIA COMPANY v. LOFTIS.

[72 Ohio St. 288, 74 N. E. 179.]

CARRIER OF PASSENGERS—Liability Beyond Its Own Line.

The mere issuance and sale by a carrier of passengers of a coupon ticket over its own and connecting lines does not of itself import an undertaking to become responsible for the safe carriage of the passenger beyond its own line. (p. 600.)

CARRIER OF PASSENGERS—Liability Beyond Its Own Line.

A railway company selling a ticket for transporting beyond its own line may, by contract, either express or implied, make itself responsible for the safe carriage of the passenger over the entire route covered by the ticket. (p. 600.)

CARRIER OF PASSENGERS—Evidence of Contract of Carriage.

Where the scope and extent of the contract made by a carrier with a passenger, or the duty and obligation assumed by it, is a fact in issue, the ticket sold is not the only evidence that may be introduced and considered, but the fact may be shown by any competent parol testimony. (p. 601.)

CARRIER OF PASSENGERS—Connecting Railways—Presumption as to Liability.

Where a railway company sells a coupon ticket over connecting lines, the presumption is that it acts as agent of the connecting lines, and that each will be responsible for the safe carriage of the passenger over its own road only. (p. 603.)

Carey & Mullins and C. C. Bow, for the plaintiff in error.

Craine & Snyder, for the defendant in error.

²⁸⁸ CREW, J. Catharine Loftis, who was the wife of the defendant in error, John Loftis, on May 9, 1898, purchased from the plaintiff in error, the Pennsylvania Company at its ticket office in Alliance, Ohio, an excursion ticket from Alliance to Columbus and return. The ticket issued to her was a special excursion coupon ticket containing four coupons, and was in form as follows:

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Special Excursion Ticket.	
ALLIANCE, O. to COLUMBUS, O. AND RETURN.	
Sold May 8th, 1898. Rate, \$.....	
P. Line—Orrville. C. A. & C.—Columbus.	
1st Class Ex. 8237	AGENT'S STUB. To be detached and preserved as record of sale.

Issued by The Pennsylvania Co.	
SPECIAL EXCURSION TICKET. ORRVILLE, OHIO, to ALLIANCE, O. Via Pennsylvania Line. Good only on Special Train SUNDAY MAY 8th, 1898. When Stamped by Selling Agent. NO STOP-OVER ALLOWED. Ex. 8237	
E. A. FORD, General Passenger Agent.	

Alliance, O. to Columbus, O. and Ret.

Issued by The Pennsylvania Co.	
SPECIAL EXCURSION TICKET. Columbus, Ohio, to Orrville, Ohio. Via Cleveland, Akron & Columbus Ry. Good only on Special Train leaving Columbus at 6.30 p. m. Sunday May 8th, 1898, when stamped by selling Agent. Not good if detached. Ex. 8237. No stop-over allowed	

Alliance, O. to Columbus,
O. and Ret.

Issued by The Pennsylvania Co.	
SPECIAL EXCURSION TICKET. Orrville, Ohio, to Columbus, Ohio. Via Cleveland, Akron & Columbus Ry. Good only on Special Train, Sunday May 8th, 1898, when stamped by selling Agent. Not good if detached. Ex. 8237. No stop-over allowed.	

Alliance, O. to Columbus,
O. and Ret.

Issued by The Pennsylvania Co.	
SPECIAL EXCURSION TICKET. Alliance, Ohio, to Orrville, Ohio. Via Pennsylvania Line. Good only on Special Train, Sunday May 8th 1898, when stamped by selling Agent. Not good if detached. Ex. 8237. No stop-over allowed.	

Alliance, O. to Columbus,
O. and Ret.

290 After procuring the ticket she boarded an excursion train at Alliance on the Pennsylvania lines and entered upon her journey to Columbus. The Pennsylvania Lines extended only from Alliance to Orrville. When the excursion train reached Orrville the coaches of said train, including the one in which said Catharine Loftis was a passenger, were switched to the track of the Cleveland, Akron and Columbus Railway, a connecting line, over which line they were then run from Orrville to Columbus. As the train was entering the city of Columbus it was, by reason of the spreading of the track, derailed, several of the coaches were overturned and broken and several of the passengers were injured, one person being killed. Among those injured was Catharine Loftis. Thereafter, to wit, on April 22, 1902, her husband, John Loftis, the defendant in error herein, brought an action in the court of common pleas of Stark county, Ohio, against the plaintiff in error, the Pennsylvania Company, to recover damages for the loss of the services of his said wife, Catharine Loftis, and to recover for doctor bills incurred and paid by him for her in consequence of the injuries sustained by her in said accident. The petition filed by him in said action contained the following averments with respect to the contract to carry, alleged to have been made by the Pennsylvania Company with said Catharine Loftis, to wit:

On or about the eighth day of May, 1898; one Catharine Loftis, then and now the wife of this plaintiff, entered into a contract with the defendant, whereby the defendant in consideration of the sum of two dollars (\$2.00), to it paid, thereby agreed to accept said Catharine Loftis as a passenger on its 291 cars and convey her as such passenger the entire distance, from the city of Alliance, Ohio, to the city of Columbus, Ohio, and return, over the lines of the defendant, the Pennsylvania Company, and said Catharine Loftis was to be conveyed the entire route in the cars of the defendant without any change of cars whatever.

On or about the eighth day of May, 1898, in pursuance of said contract, said Catharine Loftis, purchased and paid the defendant for a ticket for the entire trip from Alliance, Ohio, to Columbus, Ohio, and return, over the defendant's lines, and on said date Catharine Loftis took passage in defendant's cars as designated by the defendant for the purpose of said trip, and the defendant thereupon undertook to convey plaintiff from said city of Alliance to said city of Columbus and return in its cars, and over its lines.

For answer, the Pennsylvania Company, after admitting its corporate capacity and that it was a common carrier of passengers, denied each and every other allegation in plaintiff's petition contained. The case was submitted to a jury and resulted in a verdict and judgment in favor of the plaintiff, John Loftis, for three hundred dollars. This judgment was affirmed by the circuit court. To reverse this judgment of affirmance the Pennsylvania Company prosecutes error.

²⁰⁴ The two principal contentions of the plaintiff in error in this case are: 1. That it was not shown by competent evidence that there was any contract or undertaking on the part of the Pennsylvania Company to become responsible for the transportation of Catharine Loftis beyond the terminus of its own line, and therefore that it is not liable for the injury received by her through the default or negligence of the Cleveland, Akron and Columbus Railway, a connecting line; 2. That the court of common pleas erred in refusing to give the jury certain instructions requested by counsel for the railway company. If counsel for plaintiff in error are right as to either of these contentions, it follows that the judgment of the circuit court was wrong and should ²⁰⁵ be reversed. As to the first of the above propositions counsel would seem to rest their claim upon the assumption that the coupon ticket issued to Catharine Loftis by the Pennsylvania Company was and is itself the only proper evidence in this case of any undertaking or agreement on its part to receive and carry said Catharine Loftis as a passenger from Alliance to Columbus and return, and that therefore, as a common carrier, it is shown to have assumed toward her any other or different duty or obligation than such as the sale of said ticket would itself imply. As to a common carrier of passengers, as distinguished from a carrier of goods or baggage, the doctrine would seem now to be generally well settled that the mere issuance and sale by the former of a coupon ticket good over its own and connecting lines, does not of itself import an undertaking or agreement on the part of the issuing or selling company to become responsible for the safe carriage of the passenger to whom such ticket is sold beyond its own line. Yet it is equally true, and not less well settled, we think, that a railway company selling a ticket for the transportation of a passenger beyond its own line of road, may by contract either express or implied make itself responsible for the safe carriage of such passenger over the entire route covered by the ticket sold: Hutchinson on Carriers, secs. 577, 578; 4 Elliot:

on Railroads, sec. 1596; *Young v. Pennsylvania R. R. Co.*, 115 Pa. St. 112, 7 Atl. 741; *Pennsylvania R. R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Hartan v. Eastern R. R. Co.*, 114 Mass. 44; *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. Rep. 136, 39 L. ed. 176; *Van Buskirk v. Roberts*, 31 N. Y. 661; 3 *Thompson on Negligence*, sec. 3352. And where, as in this case, the scope and ²⁹⁶ extent of the contract made, or the duty and obligation assumed by the railway company, is a fact in issue, the ticket sold is not itself the only evidence that may be introduced and considered upon such issue, but the fact may be shown or proved by any competent parol testimony.

In the present case it was alleged by plaintiff in his petition that the Pennsylvania Company "in consideration of the sum of two dollars to it paid, thereby agreed to accept said Catharine Loftis as a passenger on its cars and convey her as such passenger the entire distance from the city of Alliance, Ohio, to the city of Columbus, Ohio, and return, over the lines of the defendant, the Pennsylvania Company, and said Catharine Loftis was to be conveyed the entire route in the cars of the defendant without any change of cars whatever." As tending to prove the particular agreement and undertaking so alleged, evidence was introduced by plaintiff showing that sometime prior to May 8, 1898, the Pennsylvania Company caused to be inserted in the Alliance "Daily Leader," a newspaper published in the city of Alliance, the following advertisement: "Special Sunday excursion to Columbus via Pennsylvania Lines, May 8th, next Sunday; two dollars round trip. Excursion tickets will be sold to Columbus from Alliance, via Pennsylvania Lines, special train leaving at 6:45 A. M. central time, returning, leave Columbus 6:30 P. M. All day to see the Capitol City. Ohio National Guards are encamped at Columbus." The obvious purpose of this notice was to advise and inform the public that on the day and at the time named therein, a special excursion train would be run from Alliance to Columbus and return over or "via" the Pennsylvania ²⁹⁷ Lines, and that round-trip tickets would be sold by the Pennsylvania Company for said excursion good for the round trip.

This notice came to the attention of Catharine Loftis and the matter of said excursion was talked over by her with members of her family before she procured her ticket. This advertisement contained no information or notice that said excursion

train would be run over any line other than Pennsylvania Lines; and Catharine Loftis had no notice of any limitation on the responsibility of the Pennsylvania Company, or that said company would not be in entire charge and control of said excursion train from Alliance to Columbus and return. Evidence was also given showing that for the ticket sold to said Catharine Loftis a single charge was made for the entire trip and that payment therefor was made to and received by the ticket agent of the Pennsylvania Company at its office in Alliance. It was further shown that this was a special excursion train, and as made up when it left Alliance, was composed entirely of coaches belonging to the Pennsylvania Company and that these coaches were intended to be and were run through from Alliance to Columbus without change.

These with other facts and circumstances proven in this case, while not of themselves conclusive upon the question of the contract made or obligation and duty assumed by the Pennsylvania Company, were nevertheless, we think, competent to be given in evidence as bearing upon that question, and as tending to show, on its part, an entire contract or undertaking to carry from Alliance to Columbus and return. Being competent as evidence, their probative force, and the weight and effect to be given them, in the light of all the facts ²⁰⁸ and circumstances proven, was a question to be determined by the jury under proper instructions from the court.

2. On the trial of this cause in the court of common pleas, counsel for the railway company submitted to the court certain requests to charge among which were the following:

“1. A railroad company which sells a coupon ticket over its own and a connecting line is presumed, in the absence of evidence to the contrary, to act as the agent for the connecting line, and is not liable to the purchaser of such ticket, for injuries sustained by reason of the negligence of such connecting line.

“2. If the jury find that in selling plaintiff's wife a ticket to Columbus and return—if they do find that such a ticket was sold—the defendant was acting as agent for the Cleveland, Akron and Columbus Railway Company, so far as passage over that road was concerned, the plaintiff cannot recover in this action.

“3. The fact that the defendant at the time it sold plaintiff's wife her ticket to Columbus (if the jury find that it did

sell such ticket), and collected fare for the entire distance, is not, of itself, sufficient to warrant the jury in finding that defendant had contracted to carry the plaintiff's wife any farther than the end of its own line, which the testimony shows was at Orrville."

These requests were all of them pertinent to the issues involved, and each correctly states the rule of law applicable to the particular state of facts to which it was intended to apply. They should therefore have been given to the jury. As hereinbefore ²⁹⁹ stated the sale by a railroad company of a coupon ticket containing coupons entitling the person to whom it is sold to transportation as a passenger over a connecting but independent line, does not necessarily import a contract or undertaking on the part of the company selling such ticket to become responsible for the safe carriage of such passenger for the entire distance, or beyond its own line, even though such ticket contains no express provision limiting the liability of the company issuing or selling the same to its own line of road.

Unless the contrary appears the presumption is, that a railway company selling such coupon ticket over connecting but independent lines, in making such sale acts as the agent of the connecting line in the sale of the coupons, and said coupons are regarded as in the nature of separate tickets on behalf of the connecting carriers, and binding upon them in the same manner as if issued or sold by themselves, and in the absence of evidence showing a different undertaking or obligation each will be responsible only for the safe carriage of the passenger over its own line. The above instructions asked by the railway company merely called for the application of these rules of law to facts which there was evidence in the case tending to prove or establish, and we think, therefore, the trial court erred in refusing to give them. Other special requests were submitted by counsel for the railway company, but these, we think, were either properly refused or sufficiently covered by the general charge. The refusal of the court of common pleas to give to the jury the requests above designated, being one of the errors assigned by the railway company in the circuit court, that court erred in affirming the judgment of said ³⁰⁰ court of common pleas. The judgment of the circuit court in this case will therefore be reversed.

Davis, C. J., Shauck, Price and Summers, JJ., concur.

LIABILITY OF AN INITIAL CARRIER FOR THE TORTS OR NEGLIGENCE OF CONNECTING LINES.***I. Carriage of Goods and Freight.****a. Where There is No Special Contract.****1. English Rule, 604.****2. American Rule, 605.****b. Where There is a Special Contract.****1. For Through Transportation.****A. In General, 606.****B. Evidence of Through Contract, 606.****C. Payment of Freight as Showing Through Contract, 607.****D. Joint Liability When One Freight is Paid, 608.****2. For a Limited Liability, 608.****c. Where There is Concurring Negligence, 608.****d. Where Car is Defective or Improperly Equipped, 609.****e. Shipments of Livestock, 609.****II. Carriage of Passengers.****a. In General, 610.****b. Special Contract for Through Transportation, 610.****c. Where Several Carriers Form a Single System, 611.****d. Agreement for Limited Liability, 612.****III. Carriage of Baggage, 612.****I. Carriage of Goods and Freight.****a. Where There is No Special Contract.**

1. English Rule.—The rule appears to be settled in England, that where a railroad company accepts goods, directed to a place beyond the terminus of its own line, without limiting its liability by express agreement, it assumes the duty of delivering them safely at their destination, and becomes answerable for their loss or injury occasioned by the negligence of a connecting carrier after they have been transferred to it: See the monographic note to *Wells v. Thomas*. 72 Am. Dec. 232-234. Said Chief Justice Brickell, in approving the English rule: "The true doctrine, that which is most consistent with all the principles which govern the liability and duty of carriers, and which seems to us required by the same necessity and public policy upon which these principles are founded, is, that a common carrier who receives goods destined for a place beyond his own line of transportation, not expressly otherwise limiting his duty and liability, must be regarded as contracting for a delivery at the point of destination. It cannot be said that this rule is more unjust to the carrier than that which holds him liable as an insurer for loss or injury not occurring by the act of God or of the public enemy. Nor is it more unjust than the rule which compels him to receive all goods within the scope of his business which are offered to him for transportation on his own line. The injustice seems to us to be visited upon the public, who are compelled to employ carriers, if

*REFERENCE TO MONOGRAPHIC NOTE.

Burden of proof as between connecting carriers to show who is at fault for loss or injury: 101 Am. St. Rep. 392-399.

the opposite rule is adopted": *Mobile etc. R. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13. See the argument for the English doctrine as set forth in the recent case of *Kansas City etc. R. R. Co. v. Washington (Ark.)*, 85 S. W. 406.

2. **American Rule.**—There seems to be both policy and reason for the English rule, and it has been followed in a number of the American commonwealths: See the monographic note to *Wells v. Thomas*, 72 Am. Dec. 234-236; *Kansas City etc. R. R. Co. v. Washington (Ark.)*, 85 S. W. 406; *Chicago etc. Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Beard v. St. Louis etc. Ry. Co.*, 79 Iowa, 527, 44 N. W. 803; *Western Sash etc. Co. v. Chicago etc. Ry. Co.*, 177 Mo. 641, 76 S. W. 998. The majority of our courts, however, both state and federal, have repudiated the English rule, and have held that where a carrier receives goods consigned to a point beyond the terminus of its own line, it is not liable for their loss or injury, caused by the negligence of a connecting carrier, in the absence of a special agreement, express or implied, to transport the goods through to their destination. If there is no such contract, the initial carrier is liable only to the extent of its own route and for the safe delivery of the goods to the next carrier in the line of transportation. And the acceptance by a carrier of goods marked for a place beyond its own terminus does not import an undertaking to carry to the destination named: See the monographic note to *Wells v. Thomas*, 72 Am. Dec. 236; *Hewitt v. Chicago etc. Ry. Co.*, 63 Iowa, 611, 19 N. W. 790; *Hoffman v. Union Pac. Ry. Co.*, 8 Kan. App. 379, 56 Pac. 331; *Louisville etc. R. R. v. Chestnut*, 115 Ky. 43, 24 Ky. Law Rep. 1846, 72 S. W. 351; *Thomas v. Frankfort etc. Ry. Co.*, 25 Ky. Law Rep. 1051, 76 S. W. 1093; *Taylor v. Maine Cent. R. R. Co.*, 87 Me. 299, 32 Atl. 905; *Hoffman v. Cumberland etc. R. R. Co.*, 85 Md. 391, 37 Atl. 214; *Rickerson Roller Mill Co. v. Grand Rapids etc. R. R. Co.*, 67 Mich. 110, 34 N. W. 269; *Ortt v. Minneapolis etc. Ry. Co.*, 36 Minn. 396, 31 N. W. 519; *Crawford v. Southern R. R. Assn.*, 51 Miss. 222, 24 Am. Rep. 626; *Southern Ry. Co. v. Vaughn (Miss.)*, 38 South. 500; *Hubbard v. Mobile etc. Ry. Co. (Mo. App.)*, 87 S. W. 52; *Fremont etc. R. R. Co. v. Waters*, 50 Neb. 592, 70 N. W. 225; *Bishawaiti v. Pennsylvania R. R. Co.*, 92 N. Y. Supp. 783; *Wilson v. Louisville etc. R. R. Co.*, 103 App. Div. 203, 92 N. Y. Supp. 1091; *Knott v. Raleigh etc. R. R. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735; *Meredith v. Seaboard etc. Ry. (N. C.)* 50 S. E. 1; *Knight v. Providence etc. R. R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Harris v. Grand Trunk Ry. Co.*, 15 R. I. 371, 5 Atl. 307; *Hill v. Georgia etc. R. R. Co.*, 43 S. C. 461, 21 S. E. 837; *Hunter v. Southern Pac. Ry. Co.*, 76 Tex. 195, 13 S. W. 190; *McConnell v. Norfolk etc. R. R. Co.*, 86 Va. 248, 9 S. E. 1006; *Stewart v. Terre Haute etc. R. R. Co.*, 3 Fed. 768; *Cincinnati etc. Ry. Co. v. Fairbanks*, 90 Fed. 467, 33 C. C. A. 611; *Railroad Co. v. Pratt*, 89 U. S. (22 Wall.) 123,

22 L. ed. 827; Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679.

The statutes of some of the states declare that the liability of a carrier who accepts freight for a place beyond its usual route ceases when it delivers the freight to the connecting carrier, unless there is a stipulation to the contrary: Colfax etc. Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 668; Felton v. Central of Georgia Ry. Co., 114 Ga. 609, 40 S. E. 748; Sutton v. Chicago etc. Ry. Co., 14 S. Dak. 111, 84 N. W. 396.

b. Where There is a Special Contract.

1. For Through Transportation.

A. In General.—While it is conceded that a carrier cannot be compelled to make a contract to carry goods beyond the terminus of its own line, yet it may enter into such an undertaking. And when it contracts to deliver goods at a destination beyond its own line, it renders itself liable for loss, injury or delay on the line of another carrier over which a part of the transportation is being performed. In such cases the connecting carriers, engaged in completing the carriage, are deemed to be agents of the first carrier, for whose default and negligence it is liable: See the monographic note to Wells v. Thomas, 72 Am. Dec. 240-242; Lotspeich v. Central R. R. etc. Co., 73 Ala. 306; Coles v. Central R. R. etc. Co., 86 Ga. 251, 12 S. E. 749; Central R. R. etc. Co. v. Georgia Fruit etc. Co., 91 Ga. 389, 17 S. E. 904; Toledo etc. Ry. Co. v. Merriman, 52 Ill. 123, 4 Am. Rep. 590; Elgin etc. Ry. Co. v. Bates Machine Co., 200 Ill. 636, 93 Am. St. Rep. 218, 66 N. E. 326; Chicago etc. Ry. Co. v. Woodward (Ind.), 72 N. E. 558; Atchison etc. R. R. Co. v. Roach, 35 Kan. 740, 57 Am. Rep. 199; Ireland v. Mobile etc. R. R. Co., 105 Ky. 400, 49 S. W. 188, 453; Crawford v. Southern R. R. Assn., 51 Miss. 222, 24 Am. Rep. 626; Missouri Pac. Ry. Co. v. Twiss, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76; Harris v. Howe, 74 Tex. 534, 15 Am. St. Rep. 862, 12 S. W. 224; Gulf etc. Ry. Co. v. Insurance Co. (Tex. Civ. App.), 28 S. W. 237; Hansen v. Flint etc. R. R. Co., 73 Wis. 346, 9 Am. St. Rep. 791, 41 N. W. 529; St. Louis etc. Ry. Co. v. Edwards, 78 Fed. 745, 24 C. C. A. 300.

B. Evidence of Through Contract.—An agreement for through transportation, with its attendant liabilities, will not be inferred, it is said, from doubtful expressions or loose language, but only from clear and satisfactory evidence: Hoffman v. Union Pac. Ry. Co., 8 Kan. App. 379, 56 Pac. 331; Myrick v. Michigan Cent. R. R. Co., 107 U. S. 102, 27 L. ed. 325. For illustrations of through contracts, see the note to Wells v. Thomas, 72 Am. Dec. 240-242. An agreement "to forward" goods may amount to an agreement to carry and deliver them beyond the carrier's terminus: St. Louis etc. Ry. Co. v. Piper, 13 Kan. 505; Davis v. Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965. But it is said that a car of livestock way-

billed to a particular place is not evidence of a through contract: *Herring v. Chesapeake etc. R. R. Co.*, 101 La. 778, 45 S. E. 322.

C. Payment of Freight as Showing Through Contract.—The acceptance of goods marked to a point beyond the carrier's limit, and the payment of a through rate for freight, have been held not prima facie evidence of a contract to deliver the goods at their final destination, but simply bind the carrier to deliver to the next connecting carrier: *Pennsylvania Co. v. Dickson*, 31 Ind. App. 451, 67 N. E. 538; *Lake Shore etc. Ry. Co. v. Teeters* (Ind. App.), 74 N. E. 1014; *McEacheran v. Michigan Cent. R. R. Co.*, 101 Mich. 264, 59 N. W. 612. And it has been said, in reliance upon earlier decisions, that the mere payment of freight money to the place of destination, or the fact that the contract for transportation fixes the price for the entire carriage, is not sufficient to establish a through contract: See the monographic note to *Wells v. Thomas*, 72 Am. Dec. 242, citing *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 102, 27 L. ed. 325; *Stewart v. Terre Haute etc. R. R. Co.*, 1 McCrary, 312, 3 Fed. 768; *Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Piedmont Mfg. Co. v. Columbia etc. R. R. Co.*, 19 S. C. 353. But in *Railroad Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838, it is decided that if a common carrier gives the shipper a bill of lading stating that the goods received are to be transported by itself and connecting carriers to a certain point beyond the terminus of its line, and there delivered to a particular person, and the shipper at the same time pays, or agrees to pay, such carrier the freight charges for the whole route, this constitutes a contract for through shipment, and makes the contracting carrier liable therefor.

In a recent Missouri case (*Eckles v. Missouri Pac. Ry. Co.* (Mo. App.), 87 S. W. 99), Presiding Justice Bland said:

“There are many authorities, including some Missouri cases, which hold that payment of full freight for carriage between two points is a contract to carry between those two points, and that the first carrier is responsible for the delivery of the goods: *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965; *Lin v. Railroad*, 10 Mo. App. 125; *Fischer v. Transportation Co.*, 13 Mo. App. 133; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Jennings v. Grand Trunk Ry. Co.*, 127 N. Y. 438, 28 N. E. 394; *Atlanta & West Point R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600; *Falvey v. Georgia Railroad*, 76 Ga. 597, 2 Am. St. Rep. 58; *Hill Mfg. Co. v. Boston etc. R. R. Co.*, 104 Mass. 122, 6 Am. Rep. 202; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Perkins v. Portland etc. R. R. Co.*, 47 Me. 573, 74 Am. Dec. 507. On the other hand, there are many respectable decisions, especially by the federal courts, holding that prepayment of the through rate of freight does not oblige the initial carrier to do more than safely and within a reasonable time deliver the goods to its connecting carrier. But we think the doctrine of the

cases last above cited is more consonant with reason and fairer to the shipper.”

D. Joint Liability When One Freight is Paid.—And, continuing, Justice Bland, in the above case of *Eckles v. Missouri Pac. Ry. Co.* (Mo. App.), 87 S. W. 99, said further: “We think this construction is supported by the case of *Harp v. Grand Era*, 1 Woods, 184, Fed. Cas. No. 6084, where it was held: ‘Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received.’ A similar ruling was made in *Baltimore & Ohio R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26, in *Barter v. Wheeler*, 49 N. H. 25, 6 Am. Rep. 434, and in *Wyman v. Chicago etc. R. R. Co.*, 4 Mo. App. 39, where it is said: ‘It may be regarded as equally well settled, upon authority, that if several common carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line: *Barter v. Wheeler*, 49 N. H. 25, 6 Am. Rep. 434; *Bradford v. South Carolina R. R.*, 7 Rich. 201, 62 Am. Dec. 411; *Cincinnati etc. R. Co. v. Spratt*, 2 Duvall, 4; *Nashua Lock Co. v. Worcester etc. R. R. Co.*, 48 N. H. 339, 2 Am. Rep. 242; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602; *Baltimore etc. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Hart v. Rensselaer etc. R. R. Co.*, 8 N. Y. 37, 59 Am. Dec. 447.’” Where an undertaking to transport cattle is a joint one, every carrier is answerable for the negligence of each: *Chicago etc. Ry. Co. v. Halsell* (Tex. Civ. App.), 80 S. W. 140.

2. For a Limited Liability.—The courts are generally agreed that when a common carrier contracts for a through transportation, it may limit its responsibility to its own line, and stipulate that it shall not be liable for any loss or injury after the goods have passed into the control of connecting lines of carriers: See *Nashville etc. Ry. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; monographic note to *Chicago etc. Ry. Co. v. Calumet Stock Farm*, 83 Am. St. Rep. 101, 102, on the limitation of a carrier’s liability in bills of lading.

c. Where There is Concurring Negligence.—Where the concurring negligence of two or more persons results in the injury of a third person, each is answerable therefor: *Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 16 Am. St. Rep. 248, and note. Hence, a recovery may be had of an initial railway company where perishable goods, shipped over connecting lines, are injured by a negligent delay in

the transportation, each carrier being guilty of such delay, and there being no evidence that the loss was occasioned solely by the delay of the subsequent carriers: *St. Louis etc. Ry. Co. v. Coolidge* (Ark.), 83 S. W. 333, 67 L. R. A. 555.

d. Where Car is Defective or Improperly Equipped.—If a carrier fails to furnish proper cars for the transportation of freight, and damage results from their defective condition, such carrier is liable, although the injury occurred beyond its line, and although the shipper may have inspected the cars before their acceptance and was aware of their condition: *St. Louis etc. Ry. Co. v. Marshall* (Ark.), 86 S. W. 802, citing *Indianapolis etc. Ry. Co. v. Strain*, 81 Ill. 504; *Alabama etc. Ry. v. Searles*, 71 Miss. 744, 16 South. 255; *Searles v. Alabama etc. Ry.*, 69 Miss. 186, 13 South. 815; *Railroad Co. v. Pratt*, 89 U. S. (22 Wall.) 123, 22 L. ed. 827. This doctrine is applied, in *International etc. R. R. Co. v. Aten* (Tex. Civ. App.), 81 S. W. 346, to a shipment of bees in a defective car; and in *Texas Cent. R. R. Co. v. O'Loughlin* (Tex. Civ. App.), 84 S. W. 1104, to a shipment of cattle in a car improperly bedded. If a railroad company transports horses beyond its own line, it assumes the duty to deliver them to a suitable car on the connecting road; and if it transfers them to an unsuitable car, it is liable for their injury: *Eckert v. Pennsylvania R. R. Co.*, 211 Pa. St. 267, 60 Atl. 781. As to the liability of the connecting carrier, where it receives a defective car from the initial carrier, and a loss subsequently occurs on its line, see *St. Louis etc. Ry. Co. v. Myer* (Ark.), 86 S. W. 999; *Shea v. Chicago etc. Ry. Co.*, 66 Minn. 102, 68 N. W. 608; *St. Louis etc. Ry. Co. v. Carlisle* (Tex. Civ. App.), 78 S. W. 553.

e. Shipments of Livestock.—It is generally held that, in the absence of a special contract, a carrier, by receiving livestock to be shipped over its own and connecting lines, is bound only to carry them over its own line and to safely deliver them to the next carrier in the course of transportation; and it is not answerable, therefore, for losses or injuries occurring beyond its own line: *Louisville etc. R. R. Co. v. Cooper*, 19 Ky. Law Rep. 1152, 42 S. W. 1134; *Wichita Val. Ry. Co. v. Swenson*, 6 Tex. Civ. App. 34, 25 S. W. 47; *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 102, 27 L. ed. 325. It may, moreover, stipulate that it shall not be responsible after delivery to the connecting carrier: *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 231. If, however, an initial carrier makes a through contract to ship livestock over its own and connecting lines, it is answerable for the negligence of the connecting carriers: *Texas etc. Ry. Co. v. McCarty*, 29 Tex. Civ. App. 616, 69 S. W. 229; *Texas etc. Ry. Co. v. Andrews* (Tex. Civ. App.), 80 S. W. 390; *Railway Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

Where a connecting carrier confines livestock, without giving them opportunity to eat, drink and rest, the initial carrier is not liable

for the penalty prescribed by sections 4386-4390 of the Revised Statutes: *United States v. Louisville etc. R. R. Co.*, 18 Fed. 480. But where a railroad transfers a car of livestock to a connecting road, without affording an opportunity to feed and water the animals, though requested by the shipper, it is answerable for the damages which result: *Galveston etc. Ry. Co. v. Ivey* (Tex. Civ. App.), 23 S. W. 321. And where a railroad company negligently allows lambs to drink salt water before loading them for shipment, it is liable for their subsequent death resulting therefrom after they are transferred to a connecting road: *Norfolk etc R. R. Co. v. Harman*, 91 Va. 601, 50 Am. St. Rep. 855, 22 S. E. 490, 44 L. R. A. 289.

II. Carriage of Passengers.

a. **In General.**—The English courts seem to regard the sale of a passenger ticket by a railroad company over its own and connecting roads as evidence of a contract for through transportation to the point of destination, and hold that the company making the sale enters into a contract which renders itself responsible for the entire journey, and some of the American courts favor this rule: *Mytton v. Midland R. R. Co.*, 4 Hurl. & N. 615, 28 L. J. Ex. 385; *Kansas City etc. R. R. Co. v. Washington* (Ark.), 85 S. W. 406; *Chicago etc. R. R. Co. v. Mulford*, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; *Central R. R. v. Combs*, 70 Ga. 533, 48 Am. Rep. 582. But the majority of the American courts hold that the mere issuance and sale by a railroad company of the ordinary coupon ticket, good over its own and connecting lines, does not import an undertaking on the part of such initial carrier to become responsible for the safe carriage of the passenger beyond its own line. The first carrier, in such a case, is regarded as the agent of the succeeding carriers, and the coupons are considered as separate tickets, binding the successive carriers in practically the same manner as though issued and sold by themselves. This is true, although the ticket contains no express provision limiting the liability of the initial carrier to its own road; and in the absence of evidence showing a different undertaking, each is responsible for the safe carriage of the passenger over its own line only: See the principal case, ante, p. 597; *Kansas City etc. R. R. Co. v. Foster*, 134 Ala. 244, 92 Am. St. Rep. 25, 32 South. 773; *Chicago etc. R. R. Co. v. Mulford*, 162 Ill. 522, 44 N. E. 861, 35 L. R. A. 599; *Hartan v. Eastern R. R. Co.*, 114 Mass. 44; *St. Clair v. Kansas City etc. R. R. Co.*, 77 Miss. 789, 28 South. 957; *Washington v. Raleigh etc. R. R. Co.*, 101 N. C. 239, 7 S. E. 789, 1 L. R. A. 830; *Nashville etc. R. R. Co. v. Sprayberry*, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705; *Pennsylvania R. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. Rep. 136, 39 L. ed. 176; *Dresser v. Canadian Pac. Ry. Co.*, 116 Fed. 281, 53 C. C. A. 559.

b. **Special Contract for Through Transportation.**—But if it is conceded that the mere sale by a railroad company of a ticket over its

own and connecting lines does not ordinarily import an agreement to carry the passenger beyond its own terminus, and that a railroad company cannot be compelled to enter into a contract to transport a passenger to a destination beyond its own road, still it may issue a ticket for through transportation which will bind it for injuries suffered by the passenger by reason of the torts or negligence of connecting carriers while they are completing the contract of transportation: *Chicago etc. R. R. Co. v. Dumser*, 161 Ill. 190, 43 N. E. 698; *Atchison etc. R. R. Co. v. Roach*, 35 Kan. 740, 57 Am. Rep. 199, 12 Pac. 93; *Knight v. Portland etc. R. R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Chollette v. Omaha etc. R. R. Co.*, 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Carter v. Peck*, 36 Tenn. (4 Sneed) 203, 67 Am. Dec. 604; *Candee v. Pennsylvania R. R. Co.*, 21 Wis. 582, 94 Am. Dec. 566; *Barkman v. Pennsylvania R. R. Co.*, 89 Fed. 453. "It has long been settled that an owner of one of several lines for the transportation of passengers, running in connection over different portions of a route of travel, may contract as principal for the conveyance of a passenger over the whole route, and that such contract may be established by the circumstances, notwithstanding the passenger received tickets for the different lines signed by their separate agents": *Talcott v. Wabash R. R. Co.*, 159 N. Y. 461, 54 N. E. 1.

An initial railroad company may be liable beyond the terminus of its own line to a person riding under a drover's pass issued by it and entitling him to through transportation: *Omaha etc. Ry. Co. v. Crow*, 54 Neb. 747, 69 Am. St. Rep. 741, 74 N. W. 1066; *Gulf etc. Ry. Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. 391. And where an initial carrier contracts for through transportation in a car furnished by it, it is answerable for injuries to passengers, whether they occur on its own or connecting lines, caused by the car not being capable of being made comfortably warm: *Missouri etc. Ry. Co. v. Harrison*, 97 Tex. 611, 80 S. W. 1139.

c. **Where Several Carriers Form a Single System.**—And, to quote from *Lehigh Valley R. R. Co. v. Dupont*, 128 Fed. 840: "Where the lines of several railroad corporations are conducted as a single system for the purposes of the traffic between different points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency. When a relation of joint and several agency exists in a system of dominant and subordinate carriers, the dominant carrier is liable for all breaches of obligation by any of the other constituent carriers in the performance of a contract made by it for the transportation of passengers or freight. These propositions are established by the following authorities: *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12

N. E. 583; Philadelphia etc. R. Co. v. State, 58 Md. 372; Wyman v. Chicago etc. R. Co., 4 Mo. App. 35; Bradford v. South Carolina R. Co., 7 Rich. 201, 62 Am. Dec. 411; Harris v. Cheshire R. Co. (R. I.), 16 Atl. 512; Block v. Fitchburg R. Co., 139 Mass. 308, 1 N. E. 348; Independence Mills Co. v. Burlington etc. R. Co., 72 Iowa, 535, 2 Am. St. Rep. 258, 34 N. W. 320; Cincinnati R. Co. v. Spratt, 2 Duvall (Ky.), 4; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434." See, also, Richard v. Detroit etc. Ry., 129 Mich. 458, 89 N. W. 52.

d. **Agreement for Limited Liability.**—A railroad company, in selling a ticket for through transportation over its own and other roads, may, by express contract, confine its liability for negligence to a passenger on its own line, and make itself simply the agent of the connecting carriers, so as to exempt itself from responsibility for their negligence: Kerrigan v. Southern Pac. R. R. Co., 81 Cal. 248, 22 Pac. 677; Harris v. Howe, 74 Tex. 534, 15 Am. St. Rep. 862, 12 S. W. 224, 5 L. R. A. 777; Moore v. Missouri etc. Ry. Co., 18 Tex. Civ. App. 561, 45 S. W. 609. Compare, however, Central R. R. v. Combs, 70 Ga. 533, 48 Am. Rep. 582.

III. Carriage of Baggage.

The liability of an initial carrier for the loss of baggage on connecting lines beyond its terminus, including its right to limit its liability to its own line, is discussed in the monographic note to Wood v. Maine Cent. R. R. Co., 99 Am. St. Rep. 359-363. In a recent Arkansas case, it is held that, in the absence of an express contract to the contrary, the initial carrier is liable to a passenger for the loss of baggage, where it sells him a through ticket and checks the baggage through to his destination, although the loss occurs on a connecting line: Kansas City etc. R. R. Co. v. Washington (Ark.), 85 S. W. 406. This decision is followed in Little Rock etc. Ry. Co. v. Record (Ark.), 85 S. W. 421. In Askew v. Gulf etc. Ry. Co. (Tex. Civ. App.), 73 S. W. 846, the rule is recognized that an initial carrier may, by special contract, limit its liability for baggage to its own line. But a passenger who accepts a ticket and a baggage check, without knowledge of a condition on the back of the ticket limiting the carrier's responsibility to its own line, is not bound by the condition: Little Rock etc. Ry. Co. v. Record (Ark.), 85 S. W. 421. See, too, Hutchins v. Pennsylvania R. R. Co., 181 N. Y. 186, ante, p. 537, 73 N. E. 972; monographic note to Chicago etc. Ry. Co. v. Calumet Stock Farm, 88 Am. St. Rep. 80-83.

CITY OF CLEVELAND v. STANDARD BAG AND PAPER COMPANY.

[72 Ohio St. 324, 74 N. E. 206.]

WATERCOURSES—Pollution by City.—Where a stream has been used as an open sewer for more than twenty-one years by a city, and the polluted portion of the stream is entirely within the limits of the city, a riparian manufacturer therein who has contributed to and acquiesced in such use cannot be heard to complain of the pollution or of its increase. (p. 614.)

Newton D. Baker, city solicitor, Charles J. Estep and Harry F. Payer, for the plaintiff in error.

Horr & Lowenthal, for the defendant in error.

³²⁴ SHAUCK, J. On the 16th of July, 1900, the Standard Bag and Paper Company brought suit against the city of Cleveland in the court of common pleas to enjoin the city from the further pollution of a stream of ³²⁵ water known as Kingsbury run and to recover thirty thousand dollars, the damages alleged to have been sustained by it in consequence of previous pollution occasioned by discharging sewers into the stream. At the time of the bringing of the suit the company was the owner of premises lying on the westerly side of Forest street and on both sides of Kingsbury run, the premises being occupied with buildings devoted to the manufacture of paper, the water of the stream in its natural state being alleged to have been suitable for supplying the company's engines and for the processes of manufacturing paper from raw material, and was so used by it. The company alleged that by sewers constructed in 1896, 1898 and 1899 the city discharged into said stream sewage from a large area and in such quantities that it could not be absorbed or carried away by the stream, thus causing serious injury to its plant and in consequence of offensive odors emitted rendering uninhabitable a dwelling-house upon the company's premises.

In its answer the city admitted the construction and operation of the sewers as alleged in the petition, but denied that they discharged into the stream sewage from beyond the area of natural drainage. It also alleged that beginning in the year 1873 it had constructed several other sewers discharging into said run, and that it had openly and notoriously used said run for sewer purposes from that time until the filing of its answer,

all of which was done with the knowledge and acquiescence of the plaintiff and its predecessors in title and occupation; that all of said sewers were constructed at great expense to the city, and that in reliance upon such acquiescence the city had expended large sums of money in the establishment ³²⁶ and maintenance of said sewers and sewers tributary thereto.

The city also in its answer made the following allegation as its fifth defense:

"Further answering and for its fifth defense to plaintiff's petition defendant says that ever since 1860 the plaintiff and its predecessors have continuously used, and are now using, said Kingsbury run, the watercourse mentioned in plaintiff's petition, by discharging therein from its plant and its premises a great volume of sewage commingled with noxious waste substances and chemical ingredients; that said discharge and drainage so made by the plaintiff is, and always has been, highly polluting in its character, and that by its said conduct and that of its predecessors said watercourse has been continuously polluted during the time herein set forth; that this plaintiff has during all the time it has owned and possessed said plant continued its said contamination of said Kingsbury run, and that the plaintiff is invoking the interposition of this court for the abatement of acts similar in character to those complained of."

The reply of the company after denying the other allegations of the answer admitted the allegations of said fifth defense as follows:

"For reply to the fifth defense the plaintiff admits that ever since 1860 it and its predecessors in title have used, and are now using, said Kingsbury run, the watercourse mentioned in plaintiff's petition, by discharging therein from its plant and its premises the waste fluids from its manufacture of paper, but says that said discharge has been into said water at points below, on the course of said stream, any of the ³²⁷ sewers maintained by the plaintiff, and denies each and every allegation in said defense contained."

Upon the trial it appeared that after the commencement of the action, but nearly three months before the trial, the company had conveyed the premises and all its interest therein to the Cleveland-Akron Bag Company, which was then in possession of the premises, and thereupon that fact was set up in a supplemental answer which stood admitted. In the court of common pleas an injunction was refused "because of the fact that the plaintiff neither owned nor was in possession of the

property in the petition described at the date of the trial of this action," but the court nevertheless rendered a judgment against the city for incidental damages in the sum of three thousand five hundred dollars. The case was then appealed to the circuit court. On the trial in that court much testimony was introduced to show the condition of the stream and the use of its waters for a period of about forty years, and upon a consideration of all the evidence the circuit court found that the plaintiff had sustained damages by reason of the acts of the city in the sum of one hundred dollars per month. It also found that the company was not entitled to an injunction, "it appearing to the court that the nuisance complained of is one of long standing and that considerations of public policy intervene." But the court nevertheless rendered judgment against the city for incidental damages in the sum of six thousand six hundred dollars.

There is no conflict in the evidence upon any point that is material to the controversy. The stream affords surface drainage for approximately two thousand acres of the city of Cleveland, and the sanitary sewers which discharge into it are restricted to that area. Kingsbury ³²⁸ run discharges into the Cuyahoga river a short distance below the company's premises, and that river in turn discharges into Lake Erie, all within the limits of the city. From the admitted allegations of the fifth defense and the undisputed evidence it appears that the company for forty years, and the city for a period of more than twenty-five years had been using this stream for the purposes of an open sewer, and in no sense using it for the purposes for which flowing waters are primarily used, the company through all that time discharging into it the waste substances of a noxious character containing chemical ingredients from its entire plant and the discharge from its water-closets, the washings amounting to a million gallons daily.

One witness, who had been superintendent of the company's plant from 1871 to 1891 continuously, testified that in that time no effort was made to use the waters of the run for the uses of the plant because it was regarded as unfit, and his testimony in that regard is corroborated in so far as it is affected by other testimony. During the nine years following 1891 another superintendent made occasional but unavailing efforts to render the water fit for the uses of the mill by the installation of filtration plants, and upon the failure of all these efforts this suit was brought.

The other evidence in the case shows that a condition of extreme pollution was present in the stream prior to 1871. To that condition the inhabitants of the valley of the run contributed generally. Among the contributors are more than twenty large establishments discharging into the stream above the company's plant the contents of water-closets and the refuse of their business. ³²⁹ They include a slaughter-house, numerous oil refineries, a paint factory, ice works, candle and axle grease works, lubricating oil works and soap works. In the court of common pleas the facts were substantially found, and though that finding is not under review here, it is convenient to resort to it for a partial statement of the facts which were developed upon the later trial in the circuit court.

From that finding it appears that from Flick's slaughter-house located on Forest street just above the plant of plaintiff, there was a discharge, more or less continuous, of filthy water or liquid. That there were several works located on the run some distance above plaintiff's plant at that time and there was a discharge of oil or oily substance from these plants into said run. That some manufacturing plants were located on said run during the period of time that plaintiff owned the property described in said petition and prior to the commencement of this action. And since the commencement of this action many other manufacturing plants have been located on said run above plaintiff's plant. That said manufacturing plants, so located on said run have privy vaults for the accommodation of the employes of said plants, the refuse from which discharged into the run. That some of these plants were large manufacturing plants employing several hundred men each. That these plants, some of them, besides discharging sanitary sewage into said stream also discharge into it streams of polluted water. That the nearest of said plants to plaintiff was about one-half mile above the same, and others were located at various points along the run for a distance of one mile or one and one-half ³³⁰ miles above that point. That numerous private houses, located along the banks of said run, discharged their wash water into the same, and had privies located on the banks thereof.

Taking the view of the evidence most favorable to the company, the fact appears that the stream from a point approximately a mile and a half above the company's plant to its mouth was for more than twenty-one years before the beginning of the suit given over wholly to the purposes of a sewer. To the polluted condition of the stream the city admits that

it contributed largely by means of sewers which were constructed from time to time as required by the growth of the city, and this was done at great expense and without protest from the company. Upon the trial evidence was offered by the company to show injuries sustained after it had conveyed the premises to the Akron company, and to this an objection was interposed on behalf of the city. There had been no assignment of the Akron company's cause to the plaintiff company, nor was the Akron company a party of record to the suit. But this objection was overruled, the evidence admitted and taken into account by the court in its assignment of damages because of a fact which appears only by a certificate in the bill of exceptions that the Akron company appeared "and in open court adopted and ratified the prosecution of this cause by the record plaintiff and by its counsel it participated in the trial of the case."

The city interposed a motion for a new trial upon numerous grounds, including the weight and effect of the evidence, and the motion was overruled and judgment rendered by the circuit court in accordance ³³¹ with its finding. For the reversal of that judgment this petition in error is prosecuted.

³⁴¹ The judgment which this petition in error brings into review necessarily implies several propositions which it would be difficult to maintain. ³⁴² The case in the court of common pleas was a suit in equity to enjoin the further pollution of a stream of water and for incidental damages on account of injuries occasioned by its pollution previous to the bringing of the suit. The character of the suit was not changed by any amendment either in that court or in the circuit court. Both courts denied the principal relief by injunction but awarded incidental relief by way of damages. A jury was not waived. To the contrary, the city insisted that upon a mere question of damages it was entitled to the intervention of a jury. The attitude of the city toward the subject of the suit did not change throughout its progress. At the close of the suit it was as well amenable to the equitable relief sought as at its beginning.

The record shows that in the court of common pleas equitable relief was denied "because of the fact that the plaintiff neither owned nor was in possession of the property in the petition described at the date of the trial of this action"; and that in the circuit court there was a like denial of equitable relief, "it appearing to the court that the nuisance complained of is of long standing and that considerations of public policy inter-

vene." According to the record, incidental relief by way of damages was awarded although the plaintiff failed to establish its right to the equitable relief primarily sought, because, in the view of one court, it had voluntarily changed its attitude toward the subject of the suit, and in the view of the other, because of an infirmity which inhered in the equitable case of the plaintiff from the beginning.

It is not a case in which, the right to the principal relief in equity being established, a court of equity, having jurisdiction of the case to award ³⁴³ that relief, will go forward and award the plaintiff full relief by compensation in damages. Nor is it a case in which, the plaintiff's equitable case being complete, the court will substitute a judgment for damages because, owing to a change in the relation of the defendant to the property concerned, the equitable relief would be unavailing. Nor can the procedure in the case be justified by the precedents which give vitality to the law of *lis pendens* by holding that one who purchases property which is the subject of litigation purchases it subject to the event of the pending suit. Assuming that the courts below were correct in the view that the company was entitled to recover damages, when its equitable case failed for either of the reasons assigned, it should have been restricted to its action for money only in which either party would be entitled to a jury. In those states where legal and equitable remedies are administered by different courts, the plaintiff's equitable case failing for either of the reasons here assigned, its bill in equity would be dismissed and it would be remitted to its action at law.

The judgment also implies the right of the plaintiff to recover damages on account of injuries to the property after it conveyed it to another; and this because, as appears only from the certificate in the bill of exceptions, its grantee "in open court adopted and ratified the prosecution by the record plaintiff, and by its counsel participated in the trial of the case."

A more important question is, Was the company entitled to recover damages in view of the facts which appeared upon the trial? With this question in view, the facts have been fully presented in the ³⁴⁴ statement of the case, and it is not deemed necessary to repeat them here with fullness or detail. It appears that for very many years the owners of property lying by Kingsbury run for more than a mile above the company's premises have generally treated it as completely diverted from the

primary uses of a flowing stream to those of a public open sewer. It is sufficient for present purposes that both the company and the city, the parties who will be concluded by the judgment in the present case, have so treated it continuously and uninterruptedly for more than twenty-one years prior to the bringing of this suit. To that diversion both parties have effectively contributed, the city by discharging the contents of its sewers into the stream and the company by discharging it into the contents of its water-closets and a million gallons daily of noxious and polluting wastage from its paper-mill. These things were done by each without protest from the other.

The law applicable to these facts may be conveniently quoted from the texts of recognized authors. "It is hardly necessary to state that any private riparian proprietors upon a stream may acquire, as against other proprietors, special rights to the use of the water, in the nature of easements and servitudes far other and greater than those which the law confers upon him simply as a riparian proprietor": Black's Pomeroy on Water Rights, sec. 152. Servitudes are easements within the doctrine that "easements of every sort may be acquired by adverse user for the period of time limited by the statute of limitations for the right of entry upon land": Angell on Watercourses, sec. 208. "With respect to prescriptive rights it is conceded that the owner of land ³⁴⁵ upon the margin of a natural stream may by long usage acquire the right to use the water in a manner not justified by his natural rights": Gould on Waters, sec. 329.

That during the period named the city has increased the amount of sewage discharged into the run is unimportant. For more than twenty-one years before the beginning of this action pollution from sewers of the city, the works of the company and the multitudinous other sources mentioned in the statement of the case has rendered the waters wholly and admittedly unfit for any form of domestic use and devoted the run to sewerage purposes. The added sewers required by the growth of the city have been but a natural increase by it in the use of what was already a public sewer.

It is in vain that the company invokes the doctrine of *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628. Concerning that case, it may be observed that it was an extreme application of the rules of law looking to the protection of the purity of flowing waters. Indeed, it was so extreme as to bring the case into conflict with very many authorities and to prevent

the concurrence in the judgment of half of the members of this court. But its correctness need not be questioned here. Differences between the cases are obvious and legally important. The stream, whose waters were there the subject of controversy, after flowing by the city of Mansfield, continued to flow through the open country, where they were continuously used for domestic purposes. The suit was brought by a riparian owner who had in no manner contributed to rendering the stream unfit for the purposes for which he insisted that the city should ³⁴⁶ preserve it. It was brought before prescriptive rights had attached. In the present case the polluted portion of the stream is wholly within the city of Cleveland, where its surroundings are appropriate to the secondary use to which it has been devoted; the suit is brought by a plaintiff whose contributions to the pollution of the stream would render it unfit for primary or domestic purposes, and it was brought after prescriptive rights had attached. If differences so vast should pass unobserved by the courts, the bandage upon the eyes of imaged justice would substantially change its symbolic meaning. Indeed, it would be difficult to sustain a recovery by the present plaintiff if the city had not acquired prescriptive right to interfere with the original flowage of the water. But the case concedes the general proposition that the riparian owner has the right to the flowage of water in its natural condition as to purity, and it concedes all that was decided in *Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, for from its essential nature a servitude is always in derogation of common right.

We trust that the view of the subject which we have taken has not been influenced by a desire to enjoy the rare felicity of awarding a substantial triumph to both parties. For the operation of its plant the company can doubtless secure a supply of sufficiently pure water from sources which have become known in the thirty-five years during which resort has been had to them. And the conclusion that Kingsbury run is not within the rules of law for the protection of streams devoted to their primary uses may exempt the company from the ruinous consequences of indictment and punishment under section 6919 and the following sections of the Revised Statutes ³⁴⁷ providing for the punishment of offenses against public health.

The judgment will be reversed; and, as the case presented suggests no reason why it should further vex either of the par-

ties or occupy the time of the courts, a final judgment will be rendered here in favor of the plaintiff in error.

Judgment accordingly.

Davis, C. J., Price, Crew, Summers and Spear, JJ., concur.

The Pollution of Waters by cities and municipal corporations is discussed in the monographic note to *Winchell v. Waukesha*, 84 Am. St. Rep. 908-926.

LEMERT v. LEMERT.

[72 Ohio St. 364, 74 N. E. 194.]

BANKRUPTCY.—A Decree for Alimony is not discharged by bankruptcy proceedings, because it is not a provable claim therein. (p. 621.)

A DECREE FOR ALIMONY does not Become Dormant, in Ohio, when no execution has been sued out thereon within five years. (p. 621.)

The issues of fact in this case present two questions, namely, the effect of a discharge in bankruptcy upon a decree for alimony, and the effect upon such decree of a failure to issue an execution within five years.

A. J. Andrews, for the plaintiff in error.

F. F. D. Albery and H. C. Wine, for the defendant in error.

³⁶⁷ The COURT. 1. Was the decree for alimony discharged by the final discharge of the plaintiff in the bankruptcy proceedings, the claim not having been proven therein nor any dividend paid thereon? The circuit court held that it was not discharged because the decree for alimony was not a provable claim in the bankruptcy proceeding. We think this conclusion was sound both upon reason and upon authority: *Audubon v. Schufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735, 45 L. ed. 1009; *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. Rep. 757, 47 L. ed. 1084; *Wetmore v. Markoe*, 196 U. S. 68, 25 Sup. Ct. Rep. 172, 49 L. ed. 390.

2. Did the decree for alimony become dormant because no execution had been sued out thereon within five years? The circuit court answered this question in the negative. In this conclusion, also, we think the ³⁶⁸ court was right. A decree for alimony is not a judgment within the meaning of section

5380, Revised Statutes, which provides that a judgment on which execution has not issued for five years shall become dormant and shall cease to operate as a lien on real estate, nor is it a judgment or finding, within the meaning of section 5367, which provides for the revivor of a dormant judgment, or a finding for money in any equitable proceeding.

Judgment affirmed.

Davis, C. J., Shauck, Price, Crew, Summers and Spear, JJ., concur.

An Alimony Decree does not seem to be such a debt as will be discharged in bankruptcy proceedings: See the extended note to *Harding v. Harding*, 102 Am. St. Rep. 702. Consult, also, *Dunbar v. Dunbar*, 180 Mass. 170, 94 Am. St. Rep. 623; *McKittrick v. Cahoon*, 89 Minn. 383, 99 Am. St. Rep. 606.

WHEELING AND LAKE ERIE RAILROAD COMPANY v. TOLEDO RAILWAY AND TERMINAL COMPANY.

[72 Ohio St. 368, 74 N. E. 209.]

EMINENT DOMAIN—Necessity of Taking a Particular Tract. While a corporation has a primary discretion in determining what land it is necessary to appropriate in the exercise of its power of eminent domain, the probate judge has authority to prevent an abuse of such power, where the statute vests him with jurisdiction to determine the necessity in general of making an appropriation; and the law thus affording an adequate remedy, equity will not restrain the condemnation of a particular tract. (p. 632.)

RAILROADS—Mode of Constructing Crossings.—The Statute passed May 10, 1902, by the Ohio legislature, which authorizes the court of common pleas to define the mode by which one railroad may cross another, is original legislation, in force and effect from and after its passage, and pending actions and proceedings are not exempt from its operation by reason of the provisions of section 79 of the Revised Statutes. (p. 633.)

Squire, Sanders & Dempsey, Smith & Beckwith, Seiders & Monnette, Charles A. Seiders, Alexander L. Smith and Swayne, Hayes, Fuller & Tyler, for the plaintiffs in error.

King & Tracy, Hamilton & Kirby, Brown & Geddes, Schmettean & Williams and Doyle & Lewis, for the defendant in error.

369 SUMMERS J. May 6, 1902, the Toledo Railway and Terminal Company, a railroad corporation building a railroad in the city of Toledo, commenced proceedings in the probate

court of Lucas county to appropriate the right to cross with its railway tracks the railway tracks and right of way of the Wheeling and Lake Erie Railroad Company in three places: 1. With its main line; 2. With one of its spur tracks, both east of the Maumee river; and 3. With one of its spur tracks west of the river. The jurisdictional questions were determined in favor of the expropriator and the verdict of the jury assessing compensation and damages was confirmed. Thereupon, on November 24, 1902, the Wheeling and Lake Erie Railroad Company, plaintiff, brought the present suit in the court of common pleas of that county for an injunction to prevent the Toledo Railway and Terminal Company, the defendant, from taking possession ³⁷⁰ of the property and from constructing one of said crossings. The petition is too lengthy to be set out, and the following summary of it made by plaintiff's counsel is sufficient.

The first cause of action in the petition alleges: That the plaintiff owns and operates about four hundred miles of railroad, and that in the city of Toledo, its northern terminus, it has three yards, one on the west side of the Maumee river known as "Toledo" yard, and two on the east side of that river known, respectively, as "Homestead" and "Ironville" yards. These two yards are in close proximity to each other, "Ironville" yard lying to the west of "Homestead" yard, and the main track passing through each, thence on west to the "Toledo" yard, where are located plaintiff's passenger and freight depots, and that a large number of trains pass through these yards daily. "Ironville" and "Homestead" yards have each a large number of tracks, which are all necessary to the proper discharge of plaintiff's terminal business, and are used for the storage and distribution of cars coming into the city, to other railroads, industries and shippers, and to collect cars from such other railroads, industries and shippers and making them up into trains for points along the line of its road. In the "Ironville" yard are located the plaintiff's general shops, also repair tracks and a roundhouse, all of which have connected therewith a large number of tracks which are in constant and necessary use daily.

These yards have been constructed at a great cost, are an integral part of plaintiff's railroad system, the unimpaired use of which is absolutely necessary for the proper discharge of plaintiff's duties as a public carrier, and its increase of business has made ³⁷¹ it necessary to increase its facilities, and, prior to the acts defendant complains of, it acquired at great

expense a large amount of property to enlarge its "Ironville" yard, and construct additional tracks and roundhouse.

It is further alleged that the defendant has instituted proceedings in the probate court to appropriate the right to cross with its track at grade the tracks of the plaintiff at a point through the east end of the "Ironville" yard, and that at the preliminary hearing the court found in favor of the plaintiff in said proceeding all questions involved in said preliminary hearing, that the compensation and damages have been assessed by a jury, and that the defendant threatens to, and will, upon affirmance of the verdict, unless restrained, pay the money into the court, and proceed to enter, take possession, and construct, maintain and operate its railroad across the tracks of said "Ironville" yard.

The petition then sets forth: "That the tracks in said yard are so located and constructed that in order to operate the same, and to sort out cars and make up trains, and in order to take cars to and from said roundhouses, shops, repair tracks and from its other yards, and for the purpose of taking cars and trains to and from other railroads, industries, docks and shippers in said city, and from the said 'Homestead' yard, it is necessary for the engines, trains and cars operated and handled by the plaintiff to constantly pass and repass over the point where the defendant seeks to and will construct its railroad tracks unless restrained by the order of this court, and that if the defendant is permitted to construct, maintain and operate its said tracks at said point at grade, the plaintiff will be ³⁷² greatly obstructed, hampered and interfered with in the use of said yards, the operation thereof will be dangerous to life and property, and as a result thereof the said yards, and especially said 'Ironville' and 'Homestead' yards, will be practically destroyed and unfitted for the uses to which they are now devoted."

The plaintiff further alleges that it is unnecessary to cross said yard at grade, and it is practicable and feasible for the defendant to carry its line of road over the tracks of plaintiff by an overhead crossing, which will not in any way impair its usefulness, nor materially increase the cost of construction, and would not materially interfere with the operation of plaintiff's tracks and yard, and that to induce said defendant to construct said overhead crossing, the plaintiff offered to contribute to the expense thereof the sum of two thousand five hundred dollars.

For a second cause of action the plaintiff averred that it had, on the twenty-seventh day of May, 1902, commenced an action in the court of common pleas of that county against the defendant, and that in its petition in said action further alleged that the defendant, the Toledo Railway and Terminal Company, had located its line of railroad so that the same should cross at grade the line of railroad of this plaintiff at the point or place hereinbefore described and within the limits of said "Ironville" yard, and that said crossing, if permitted to be constructed, would cross five tracks of the plaintiff, forming an integral part of said yard, and which were in constant and daily use and absolutely necessary in order to use the yard for the purposes to which it was, and for a long time theretofore has been, devoted; and that such crossing, if permitted, would result in a practical destruction of the uses to which plaintiff ³⁷³ has devoted its property at said point, and greatly and materially impair the uses to which plaintiff devoted the balance of its said "Ironville" yard; would interfere with the plaintiff's use of its "Homestead" yard and render the operation of its terminal facilities, as well as its main line of railroad at said point, extremely dangerous.

"It was further alleged in said petition that said grade crossing was unnecessary, inasmuch as it was perfectly practicable and reasonable for defendant to cross the tracks of the plaintiff at said point either overhead or undergrade, without interfering with the operation of its line of railroad, and that such manner of crossing would inflict less injury to the plaintiff than the crossing proposed by the defendant.

"It was further alleged in said petition that the plaintiff was unable to agree with said defendant as to the manner in which the said crossing should be constructed.

"Plaintiff prayed in said petition that said court should ascertain and define by its decree the mode of crossing by the defendant which would inflict the least injury upon the plaintiff, and that if in the judgment of the court it was reasonable and practicable to avoid a grade crossing, that the court should prevent by its decree such crossing at grade and issue an injunction restraining the defendant from constructing, maintaining and operating a crossing at grade as proposed by it."

It is further averred that said action is still pending and that no hearing has been had or any order been made therein, and that at said preliminary hearing in the probate court due proof was made of the pendency of said action and of the

prayer of the ³⁷⁴ petition, and that notwithstanding the same the probate court proceeded.

It is unnecessary to state the answer and reply for the reason that on the trial on appeal in the circuit court that court refused to receive any evidence and dismissed the petition on the ground that it does not state a cause of action.

In the second case, on May 9, 1902, the terminal company commenced proceedings in the probate court of Lucas county to appropriate the right to construct several crossings over the Ann Arbor Railroad in the city of Toledo, the Pere Marquette Railroad Company being made a party because it has by agreement a right to use the tracks of the Ann Arbor Company. On September 25, 1902, the Ann Arbor Railroad Company and the Pere Marquette Railroad Company, plaintiffs, brought the present suit in the court of common pleas against the Toledo Railway and Terminal Company, defendant, to enjoin it from prosecuting the appropriation proceeding. The averments of the petition are to the effect that one of the crossings sought to be appropriated is located at grade across four tracks of plaintiff's road, three of which connect two of its yards; that such appropriation will irreparably injure the plaintiff; that it is not necessary for defendant to cross at that particular place, and other places are specified where, it is averred, the defendant could cross without impairing the usefulness of its road or materially increasing the cost of its construction and without serious injury to plaintiff's property, and the prayer is that the defendant be restrained from prosecuting said proceeding to appropriate and from constructing a crossing at that particular place, and that if on final hearing it should be determined ³⁷⁵ that it is reasonably necessary and that the defendant has the right to cross at that particular place, that it be restrained from the further prosecution of said appropriation proceeding until the mode and manner of crossing has been fixed by the decree of the court of common pleas.

The court of common pleas and the circuit court each refused to receive any evidence and dismissed the petition on the ground that it did not state a cause of action.

³⁷⁸ In the first case the first cause of action is grounded upon the absence of an adequate remedy at law. The contention on the part of plaintiff, as we understand it, is that the right sought to be appropriated is inconsistent with and destructive of plaintiff's right; that the use to which defendant seeks to subject the property will be subversive of the use

made of it by plaintiff, and that inasmuch as that use is public, that particular property is not subject to appropriation, and the probate judge having no jurisdiction to determine what property may be taken, is without authority to determine the question of inconsistent public uses. The argument then proceeds to the effect that prior to the act of 1872 (69 Ohio Laws, 88), in which it was provided that the probate judge shall determine the questions of the corporate existence of the corporation, its legal right to make appropriations of private property under the act, its inability to agree with the owner of the property sought to be appropriated, and the necessity of the appropriation, this court had ruled that the right of such a corporation to appropriate private property depends upon a showing of its corporate existence and its legal right to make appropriation of private property; that the former was shown by its certificate of incorporation and the latter by proof of ³⁷⁹ its organization; that this was the legal signification of these words before the passage of the act and that they must be understood as so used in the act; that the question of the necessity of the appropriation does not involve the determination of the necessity of taking the particular property sought to be appropriated, but is limited to whether the particular railroad is for a public or for a private purpose.

In the second case the petition is grounded upon the assumption that the probate court is without jurisdiction to determine the necessity of appropriating the right to cross at the particular place at which the right is sought, and that an appropriation of the right to cross at that particular place would be, under the facts stated, an oppressive and unjustifiable use of its corporate power by the defendant, which a court of equity may prevent. And the contention of counsel, while in line with that of counsel in the first case as to the legal signification of certain of the jurisdictional questions, yet, as to the question of necessity, is that it is within the political power intrusted to the general assembly, and that it may not delegate it to the judiciary; that in requiring the probate judge to determine the necessity for the appropriation the legislature intended only that he should determine that the proposed taking is for a real bona fide public use.

Conceding that the signification of the question of corporate existence and of the question of legal right is to be ascertained by reference to the decisions of this court prior to the act of 1872, is it not probable that the submission of the

question of the necessity of the appropriation to the determination of the probate judge was but the adoption of the suggestion ³⁸⁰ of an eminent judge of this court? In *Giesy v. Cincinnati etc. R. R. Co.*, 4 Ohio St. 326, decided prior to 1872, Ranney, J., suggested that to him it would seem "much more consistent with a proper regard for private rights, that the question of necessity as well as compensation should here, as in England, be determined by some impartial public tribunal." To what the judge referred does not clearly appear from an examination of the act of 1845, 8 Victoria, captions 18 and 20, and the decisions shortly subsequent thereto.

The right of eminent domain is the right to take private property for a public use. Whether or not the use is public is a judicial question, and the use being public the right is absolute in the general assembly, unless restricted by the constitution, and it is entirely in its discretion whether it is necessary to take property for such use, that is, whether the public welfare requires or will be promoted by such taking. It may determine the public necessity of taking property for a public use and confer the power to take for such use upon corporations or individuals, or it may confer the power to take subject to the determination by some other authority of the necessity of the particular improvement for which the property is sought or of taking the whole or any part of the particular property sought to be taken.

Mr. Lewis in his work on Eminent Domain, section 393, says: "The question of necessity in condemnation proceedings presents itself in various aspects." And he states five. The fourth and fifth he states as follows and cites many illustrative cases: "4. It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except ³⁸¹ as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts. 5. The question of necessity may arise under general grants of power which expressly or by implication limit the right to such and so much property as may be necessary for the proposed purpose. If the legislature designates how much may be taken, the courts cannot interfere, except to prevent an abuse of the power. . . . But when the statute does not designate the property to be

taken, nor how much may be taken, then the necessity of taking particular property is a question for the courts. Where the application to condemn is made directly to a court, the question should be raised and decided in limine."

In a note to *Lynch v. Forbes*, 42 Am. St. Rep. 402, 407, Judge Freeman says: "The legislature has, however, very rarely undertaken to designate the precise property which should be taken for any public use, but has generally, as in the statute under consideration in the principal case, merely conferred authority to take for the public use the lands or real estate necessary therefor. Under statutes of this character, the courts, so far as we are aware, with the single exception of those in Massachusetts, have regarded the allegation of a necessity for the taking as an issuable one, which it was not competent for the plaintiff, or person, or corporation seeking the condemnation to determine, and have permitted the person whose property was to be taken to litigate this question, and to defeat the proposed appropriation so far as it appeared to be unnecessary.

There are doubtless many instances in which it may be exceedingly difficult to determine whether or not the whole of the property sought to be acquired is necessary for the use for which it is sought to be taken, and perhaps in these cases the courts may hesitate to overrule the judgment of the corporation or other body authorized to acquire property for the public use. Whether this be true or not, it is affirmed by an almost overwhelming preponderance of the authorities that the rule apparently asserted in the principal case cannot be sustained, and that, where the legislature has only authorized the taking of such property as is necessary, the question of the necessity for taking is a judicial one which must be determined either by a court, jury, or some quasi judicial tribunal designated in the statute."

In Illinois, although there is no statutory provision making the question of necessity a question for the courts, the court holds that the question may be made, and that while a railway company is vested with a large discretion to determine the land necessary for its purposes, yet it is subject to the power of the courts to prevent an abuse of it: *O'Hare v. Chicago etc. R. R. Co.*, 139 Ill. 154, 28 N. E. 923.

"The Sanitary District of Chicago, under the power conferred upon it by the legislature, when proceeding to condemn lands for the purpose for which it was organized, must, of

necessity, to a modified extent, be allowed to determine for itself the quantity of land to be taken for its ditches or channels.

"This right is subordinate to all statutory and constitutional restrictions, and also the further limitation that the courts of the state which are authorized to entertain applications to condemn, are clothed ³⁸³ with ample power to prevent any abuse of the right": *Tedens v. Sanitary District*, 149 Ill. 87, 36 N. E. 1033.

In *Re St. Paul etc. Ry. Co.*, 34 Minn. 227, 230, 25 N. W. 345, 346, it is said: "Whether, however, the use for which lands are sought to be taken in such cases is a public use, and whether they are reasonably necessary or required therefor by the corporation, or whether a proposed public use would be inconsistent with or subversive of a prior public use to which particular lands sought to be appropriated had already been dedicated—these are undoubtedly questions for the court and, so far as the determination thereof may affect the prosecution of a proposed enterprise, it will, to that extent, be under the control of the court."

In England, the practice seems to be to apply to a court of equity to enjoin a company from appropriating land not necessary for its road: *Flower v. London etc. Ry. Co.*, 34 L. J. 540; *Stockton etc. Ry. Co. v. Brown*, 9 H. L. 246. And in the latter case Lord Cranworth says: "Some general propositions admit of no doubt. In the first place, I think it clear that when the legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their act, it constitutes them the sole judges as to whether they will or will not take those lands; provided only that they take them bona fide with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of ³⁸⁴ the undertaking. In such cases, the legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers.

"This principle, founded in good sense, has been sanctioned by authority in more than one decided case."

Applying this principle it is very doubtful if the petition in either case states a cause of action, but, be this as it may, we do not think the legislature intended in requiring a determination of the necessity of the appropriation as a condition precedent to the right to appropriate to provide for a determination of the necessity of the improvement, or merely that the particular land was sought for the use of the corporation. And while it may not be best to attempt to determine the meaning of that question, it is at least apparent that it was intended thereby to so regulate or limit the exercise of the power as to prevent its abuse, and no reason is apparent why the question sought to be raised in these actions might not better be made in the appropriation cases.

We have so far proceeded upon the assumption that the meaning of the jurisdictional question of the legal right of the corporation to make the appropriation must be ascertained by reference to the cases decided prior to the passage of the act of 1872, but we do not wish to be understood as so holding. Prior to the act of 1852 appropriations had been infrequent, but there were many prior to the act of 1872, and experience may have shown the desirability of imposing upon the probate judge the duty to determine, prior to impaneling a jury, the right ²⁸⁵ to appropriate and the necessity of the particular appropriation, and there are many reasons why the court, having original jurisdiction of the appropriation, should have and many why it should not be held not to have authority to determine every question that properly may be determined in such a proceeding.

Independently of the signification of any of the so-called jurisdictional questions, it is not apparent that the jurisdiction of the probate court is limited to a determination of these questions. The fact that the legislature has seen fit, from considerations of convenience or otherwise, to require the probate judge to determine these questions in limine does not necessarily make applicable the maxim "*Expressio unius est exclusio alterius*."

There is another consideration not to be overlooked. A railroad corporation, as is shown in *Lake Shore etc. Ry. Co. v. Cincinnati etc. Ry. Co.*, 30 Ohio St. 604, does not hold an absolute right in property acquired for its right of way, but takes it by permission of the state and holds it subject to the power of the

state to grant the right to cross it for public uses to another. So that it would not follow that a court of equity has jurisdiction because of the want of an adequate remedy at law, but rather that the remedy is the measure of the right, and that in the absence of a remedy there is no right other than a right to compensation for the property appropriated, as in the case of individuals.

On May 10, 1902, the legislature passed an act, a copy of which is as follows:

"An act to provide for one steam railroad crossing another steam railroad.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. Where it becomes necessary for the ³⁸⁶ track of one railroad company to cross the track of another railroad company, unless the manner of making such crossings shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party to ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road which is intended to be crossed; and if in the judgment of such court or such judge thereof it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade.

"Sec. 2. This act shall take effect and be in force from and after its passage": 95 Ohio Laws, 530.

The second cause of action, referring to this act and asking the court to ascertain and define by its decree the mode of crossing and also averring that the court had been, in a proceeding commenced on May 27, 1902, before the termination of the appropriation proceeding in the probate court, asked to define the mode of crossing, was considered not to state a cause of action, presumably because of section 79 of the Revised Statutes, which provides that whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions or proceedings, and when the repeal or amendment relates to the remedy it shall not affect pending actions or proceedings unless so expressed and for the same reason, presumably, in the second case the court refused to entertain the application to define the mode of crossing when it found that the petition did not state a cause for injunction on other grounds. But it is to be observed that this act was ³⁸⁷ neither a repeal nor an amendment of a statute, but original legislation declared to be

in force from and after its passage, and, if valid, the court should have stayed proceedings in the probate court, and if in its judgment it was reasonable and practicable to avoid a grade crossing, it should have given effect to the commendable policy of the legislation by preventing a crossing at grade.

We have considered the appropriation cases referred to in the statement of facts and find no prejudicial error, unless it shall be found that it is reasonable and practicable to avoid the grade crossings, and judgments in those cases will not be entered at present, but the judgment of the circuit court in each of the cases under consideration is reversed, and each case is remanded to that court to ascertain and define by its decree the mode of crossing, as provided in said act of May 10, 1902, and such further proceedings as may be authorized by law, and when advised of such decrees, if it appear that the mode of crossing therein ascertained and defined is the same as the right appropriated, the judgments in the appropriation cases will be affirmed, and if such mode of crossing is not the same, the judgments will be reversed and the cases remanded for further proceedings.

Judgments reversed.

Davis, O. J., Shauck, Price, Crew and Spear, JJ., concur.

The Necessity or Expediency of appropriating any particular property in the exercise of the right of eminent domain is said not to be a subject of judicial cognizance: Postal Tel. etc. Co. v. Oregon etc. R. R. Co., 23 Utah, 474, 90 Am. St. Rep. 705. See, in this connection, the monographic note to Lynch v. Forbes, 42 Am. St. Rep. 406-408; Zircle v. Southern Ry. Co., 102 Va. 17, 102 Am. St. Rep. 805; Stearns v. Barre, 73 Vt. 281, 87 Am. St. Rep. 721. A corporation has a discretion in selecting land under the power of eminent domain which in general will not be interfered with, unless it acts in bad faith or is guilty of oppression or the taking of the particular tract will entail great loss which might readily be avoided: Union Pac. R. Co. v. Colorado Postal Tel. Co., 30 Colo. 133, 97 Am. St. Rep. 106; Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 23 Utah, 474, 90 Am. St. Rep. 705, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
OREGON.

FROEBRICH v. LANE.

[45 Or. 13, 76 Pac. 351.]

EQUITY, Relief in from Probate Proceedings.—The fact that a county court has exclusive jurisdiction in matters of probate has no peculiar force to differentiate its decrees and orders from those of any other court possessing exclusive jurisdiction within its compass. (pp. 637, 638.)

RELIEF IN EQUITY from Proceedings of Probate Courts will not be Granted for the correction of errors or irregularities, nor where the party had an opportunity to be heard in the original proceeding and to have errors revised on appeal, and neglected to avail himself thereof. (p. 638.)

ORDERS IN PROBATE.—Relief in Equity from an Order is not Prevented by the Failure to Apply for Such Relief by Motion under a statute authorizing the court, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. (p. 638.)

PROBATE, Order in, When Final so as to Entitle a Party to Relief in Equity.—Where an order has been procured through the fraud of an administrator settling his accounts contrary to an agreement made by him, such order is final, and relief may be had therefrom in equity, though distribution of the estate has not been made, nor receipts filed, nor the final discharge of the administrator granted. (p. 638.)

PROBATE.—Relief in Equity from an Order Settling an Administrator's Accounts will be granted where it appears that he procured them to be settled contrary to his agreement that he would not claim extra compensation for his services nor beyond a specified sum for attorneys' fees, if the heirs had no knowledge of the filing of the account, nor of the time fixed for settling it, though notice thereof was given in the mode prescribed by statute. They were not guilty of laches in assuming that he would keep his agreement, and were not called upon to keep a check on his actions. (p. 639.)

RELIEF IN EQUITY—Laches.—A delay of eight months after the entry of an order settling an administrator's account before bringing a suit in equity for relief from such settlement does not constitute such laches as to require the denial of the relief sought. (p. 639.)

Suit by the heirs of Samuel Froebrieh, deceased, to set aside an order of the county court of Marion county, rendered November 24, 1902, settling and allowing the final account of the defendant as administrator. The complainants are citizens of Germany and were represented in the matter of such estate by the German consul at Portland. The complaint averred that after the defendant was appointed administrator, a creditor of the decedent instituted a proceeding for the revocation of letters; that before such proceeding was terminated a compromise was effected between the defendant, such creditor, and these plaintiffs, whereby it was agreed that the contest should be discontinued, that the defendant in settling the estate would not claim any greater sum for attorneys' fees than three hundred dollars, and would not demand any extra compensation for his own services; that the defendant in his final account violated this agreement by charging one hundred and seventy-one dollars extra compensation, no part of which had been earned, and also claimed fourteen hundred and twenty-three dollars attorneys' fees, in addition to forty dollars for fees of stenographer; that such account was fixed for hearing for November 24, 1902; that before the day so fixed, in response to an inquiry of plaintiffs' attorney, the defendant concealed the fact that the account had been filed, and further, for the purpose of preventing them and their attorney from receiving knowledge of such filing, caused the notice of the settlement to be published in an obscure part of a paper, in fine type, without appropriate headline; that, relying on defendant's good faith in keeping such compromise agreement, and being deceived and misled as to the filing of the account, and having no notice thereof, the plaintiffs failed to file any objection, and the accounts were settled as filed, and that the delay in bringing this suit was caused by complainants' residence in Germany. The defendant interposed a demurrer, which was sustained and the suit dismissed. The plaintiffs appealed.

Arthur L. Veazie, F. A. Turner, C. M. Inman and Gantenbein & Veazie, for the appellants.

Frank and W. H. Holmes, for the respondent.

20 WOLVERTON, J. 1. The jurisdiction of a court of equity to interpose and set aside the order or decree of a county court approving and settling the final account of an administrator is first challenged by the demurrer. The especial ground for invoking equitable jurisdiction is fraud in procuring the order settling the account, consisting in the disregard and violation on the part of the administrator of the alleged compromise agreement, whereby he agreed that he would claim no extra compensation for his own services and no more than three hundred dollars as attorney fees and charges. It is the undoubted province of equity, long maintained, to set aside and enjoin the execution or enforcement of judgments at law and of its own decrees, when they have been procured by fraud, unaccompanied by negligence, laches or fault on the part of him who invokes the interposition of the remedy. This general statement of the law will hardly be controverted: 3 Pomeroy's Equity Jurisprudence, sec. 1364; 1 Black on Judgments, 2d ed., sec. 321; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. Rep. 901, 29 L. ed. 1013; Hayden v. Hayden, 46 Cal. 332; Gates v. Steele, 58 Conn. 316, 18 Am. St. Rep. 268, 20 Atl. 474; Brooks v. Twitchell, 182 Mass. 443, 94 Am. St. Rep. 662, 65 N. E. 843. It is earnestly and strongly controverted by respondent, however, that the rule has application to probate proceedings, and especially under our own procedure, where the county court is given the exclusive jurisdiction, in the first instance, pertaining to a court of probate, the statute **21** enumerating, among other powers, to grant and revoke letters testamentary, of administration and of guardianship, and to direct and control the conduct and settle the accounts of executors, administrators and guardians: Bellingier & Cotton's Compilation, sec. 911. Speaking generally upon the subject, Mr. Woerner says: "In dealing with the judgments and decrees of probate courts upon the final settlements of executors and administrators precisely as with the judgments of other courts, courts of chancery review, enjoin, or annul them upon application of injured parties for fraud, and in some cases for mistake, or where the matter complained of may have arisen either from fraud or mistake, or constitutes constructive fraud": 2 Woerner's American Law of Administration, 2d ed., sec. 508. So it was held in Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. Rep. 383, 28 L. ed. 934, a suit in equity to surcharge the account of an administrator, that a probate settlement of an administrator's account does not conclude as to property fraudulently withheld from it; and, in Nevada (Lucich v. Me-

din, 3 Nev. 93, 93 Am. Dec. 376), that "a court of equity certainly has the power to inquire into the final account of an executor, and proceed to hear evidence to falsify and surcharge the account for fraud, and to render such decree as is necessary to do equity in the case"; and again, in Illinois (Anderson v. Anderson, 178 Ill. 160, 52 N. E. 1038), that a judgment of the county court on final settlement between the executor and the beneficiaries may be impeached in equity for fraud. See, also, Waldron v. Waldron, 76 Ala. 285, Benson v. Anderson, 10 Utah, 135, 37 Pac. 256, and Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. Rep. 619, 28 L. ed. 547, as to the general doctrine applied to probate matters.

But the doctrine is applied as well in Arkansas (Reinhardt v. Gartrell, 33 Ark. 727), where the statute, like our own, has accorded exclusive original jurisdiction in the matter of the administration of the estates of decedents ²² to the probate courts. Mr. Justice Eakin, rendering the opinion in that case, says: "The courts of chancery have no power to take such cases out of the probate courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake or impending irremediable mischief is universal, extending over suitors in all courts, and over the decrees in those courts obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on, in the probate court, upon the basis of the reformed settlement." To the same purpose, see Shegogg v. Perkins, 34 Ark. 117. Indeed, there can be no reason why the rule should not be applied in probate matters, where the order and decree complained of are in effect final, and not merely interlocutory, with the same efficacy as to the judgments and decrees of courts of law and equity possessing general jurisdiction within their peculiar province. The circuit courts of the state possess exclusive jurisdiction in all matters not accorded to the inferior courts, yet it is competent for equity to interpose and set aside or enjoin the enforcement of their judgments at law or decrees in equity where such judgments or decrees have been superinduced by fraud, and the complainant is free from inattention, negligence and fault upon his part. So that the fact that the county court is accorded exclusive jurisdiction in the first instance has no peculiar emphasis or force

to differentiate its final orders or decrees from those of any court of record possessing exclusive jurisdiction within its compass. The equitable remedy of which we are now treating has its just limitations, however. It cannot be utilized for the correction of errors and ²³irregularities, and, where the party has had an opportunity to be heard in the original proceeding and to have the matters revised on appeal, but has neglected to avail himself thereof, he is not entitled to redress in the equitable forum: *Galbraith v. Barnard*, 21 Or. 67, 26 Pac. 1110; *Hendley v. Jackson*, 31 Or. 552, 65 Am. St. Rep. 839, 50 Pac. 915; *Conant's Estate*, 43 Or. 530, 73 Pac. 1018.

2. It is further urged that the plaintiffs had a complete remedy in the county court to open up the order of final settlement, under section 103, *Bellinger & Cotton's Compilation*, providing for the relief of a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. It may well be doubted whether such fraud as is here complained of is embraced within the purview of that section, and the question is made whether it was intended to apply in probate proceedings. But, however this may be, the remedy was not invoked, nor an adjudication had with reference to it, so that it did not preclude plaintiffs from proceeding in equity. The remedy thereby accorded, in whatsoever capacity it may be employed, is equitable in character, and we have held that when invoked in a proper case the party will be precluded by the adjudication from applying to a court of equity for relief of the same nature based upon grounds identical with those there urged: *Thompson v. Connell*, 31 Or. 231, 65 Am. St. Rep. 818, 48 Pac. 467. Hence the statute is not operative as an estoppel here, in any view we may take of its application in county court proceedings.

3. Again, it is suggested that the county court has not fully disposed of the matter, the distribution not having been made, the receipts filed or the administrator finally discharged. But we think this is not controlling, as the order settling the account was the final adjudication respecting it. The rights of the respective parties were then ascertained and determined, leaving the administrator ²⁴nothing to do but to comply with the directions of the court, whereupon he would be entitled to his discharge. In view of these considerations, we are constrained to hold that a court of equity has jurisdiction of the cause.

4. The complaint is also challenged upon the ground that it does not state facts sufficient to constitute a cause of suit; but

we are impressed that it does. The fraud complained of was such, it is true, that the heirs might have set it up before the county court by way of objections to the final account, if they had known that the account was filed and the time fixed for settling the same, but of this they were not apprised. The fraud complained of consists in the administrator's failure to keep and observe the stipulations of the compromise agreement upon his part. The heirs had a right to assume that he would faithfully observe them, and were not called upon to keep a check upon his actions and take especial notice of the proceedings had in that regard. While it may be conceded, without deciding the question now, that the notice published was sufficient to inform them constructively of the filing of the final account, and consequently of the administrator's breach of his agreement, yet, nevertheless, they allege that they had no actual notice of it until after the court had settled the account, and were thereby prevented from making the objections which they were entitled to interpose at the hearing. Under such allegations, it was not laches on the part of the heirs that they were not present at the hearing. Furthermore, it is averred that their attorneys on two occasions, after the account had been actually filed, and before the time set for hearing, inquired concerning it, and were led to believe by the administrator that it had not yet been filed, thus showing positive interposition to mislead interested parties, and thus to conceal the intended fraud.

5. Nor does the fact that plaintiffs did not institute the²⁵ present suit until more than eight months after the entry of the order of final settlement constitute such laches as to preclude them from insisting upon the remedy invoked.

The decree of the trial court will therefore be reversed, the demurrer to the complaint overruled, and the cause remanded for such further proceedings as may seem appropriate.

BELIEF IN EQUITY FROM ORDERS AND DECREES OF PROBATE AND OTHER COURTS HAVING EXCLUSIVE JURISDICTION OVER THE ESTATES OF DECEDENTS AND OF MINORS AND OTHER INCOMPETENT PERSONS.

I. General Principles, 640.

II. Decrees Settling Accounts, 640.

III. Orders of Sale and Proceedings Thereunder, 642.

IV. Decrees of Distribution, 642.

V. Orders Granting Probate of Wills and Letters of Administration, 643.

VI. Limitations, 645.

I. General Principles.—The title of our note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218, on relief in equity, other than by appellate proceedings, against judgments, decrees, and other judicial determinations was sufficiently comprehensive to include the matter of which we here propose to treat, and we shall not, therefore, reiterate the general principles supporting and controlling the granting of such relief, but only inquire whether, and to what extent, these principles are applicable to relief from orders and decrees of courts having exclusive jurisdiction of the estates of decedents and incompetents, or of courts which, though their jurisdiction is concurrent with that of some other court, have yet rightfully assumed and exercised jurisdiction and made adjudications, which, if permitted to stand, must, on the application of the principles of *res judicata*, be received as conclusive of the questions determined. Unless an exception exists in the case of grants of the probate of wills and of letters of administration, it may, we think, be safely affirmed that orders and decrees of courts of the character here under consideration may be relieved from by independent suits in equity under the same circumstances, to the same extent, and subject to the same limitations as relief may be had from other judicial determinations: *Shegogg v. Perkins*, 34 Ark. 117; *Silva v. Santos*, 138 Cal. 536, 94 Am. St. Rep. 45, 71 Pac. 703; *Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175; *Grady v. Hughes*, 80 Mich. 184, 44 N. W. 1050; *Searles v. Scott*, 14 Smedes & M. 94; *Foute v. McDonald*, 27 Miss. 610.

II. Decrees Settling Accounts.—The most familiar application of the rule just stated relates to orders and decrees settling the accounts of administrators, executors, and guardians, and of trustees performing analogous duties. These settlements, when once made and approved by courts of competent jurisdiction, have the force of *res judicata* both at law and in equity, and will not be vacated or annulled by courts of equity, except upon the establishment of some well-recognized ground for equitable relief: *Alexander v. Alexander*, 70 Ala. 357. The temptation to fraud is, however, not less in these cases than in others coming before courts, and the opportunity for exercising it is much greater than in litigation where all of the parties are generally well informed both respecting the facts of the controversy and the legal rights attending them, and furthermore, are represented by counsel attentive in safeguarding their interests. So, though there is no fraud, there may be accident or mistake such as would authorize the granting of relief from other judicial determinations. "The courts of chancery have no power to take such cases out of probate courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake, or impending irremediable mischief is universal, extending over suitors in all of the courts, and over the decrees in those courts obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced.

Hence, any fraud in the settlements of administrators or executors may be corrected": Reinhardt v. Gartrell, 33 Ark. 727; Shegogg v. Perkins, 34 Ark. 117; Jones v. Graham, 36 Ark. 383; Green v. Creighton, 10 Smedes & M. 159, 48 Am. Dec. 742; Oldham v. Trimble, 15 Mo. 225; Dingle v. Pollick, 49 Mo. App. 479; Froeblich v. Lane, 45 Or. 13, ante, p. 634, 76 Pac. 351; Bertha Z. & M. Co. v. Vaughan, 88 Fed. 566. If trustees under a will, with intent to defraud the person benefited, present a false account and secure its settlement by the court, they are guilty of fraud upon the court extrinsic to the case, as well as upon the beneficiary, and if he has no knowledge of the fraud until after the expiration of the time for moving to vacate the order of settlement or for appealing therefrom, he may maintain a suit in equity to compel the trustees to pay the amount of which he has been defrauded by the settlement: Aldrich v. Barton, 138 Cal. 220, 94 Am. St. Rep. 43, 71 Pac. 169. The same principles apply to a decree settling the account of a guardian of an incompetent person, where such guardian has fraudulently concealed moneys misappropriated by him and has made fraudulent misrepresentations to the court of the amount of his advances: Silva v. Santos, 138 Cal. 536, 94 Am. St. Rep. 45, 71 Pac. 703; Anderson v. Anderson, 178 Ill. 160, 52 N. E. 1038; Neylans v. Burge, 14 Smedes & M. 201. This rule is not abrogated by statutes purporting to make decrees and orders of courts of probate conclusive. Such statutes merely place the determination of those courts on the same footing as the determinations of other judicial tribunals without interfering with the power of equity, in proper cases, to relieve from them: Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423. In some of the states statutes have been enacted under which the authority of equity is clearly expressed and which remove any doubts that otherwise might exist upon this subject. Thus, in Iowa, a section of the code provides that mistakes in the final settlement of accounts may be corrected after the settlement "by equitable proceedings and showing such grounds as would justify the interference of the court": Tucker v. Stewart, 113 Iowa, 449, 86 N. W. 371. These statutes authorize relief to be granted against an order settling an account, and so does a statute authorizing judgments to be vacated for fraud practiced by the successful parties in obtaining them: Roll v. Stum, 20 Ky. Law Rep. 661, 46 S. W. 223. But these statutes are not essential to the jurisdiction of the court. Thus, where, as in California, in which state no special statute existed upon the subject and where its courts of probate were of exclusive jurisdiction, a bill was filed to compel an accounting for certain property, notwithstanding its omission from the accounts of an administrator, which had been settled by the court. The supreme court of the United States, reversing the judgment of the trial court, said: "It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property ac-

cidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such cases, open its decrees and administer upon the property omitted. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity": *Griffith v. Godey*, 113 U. S. 89, 5 Sup. Ct. Rep. 383, 28 L. ed. 934.

III. Orders of Sale and Proceedings Thereunder.—Orders directing the sale of the property of a decedent or incompetent, and confirming such sales when made, are, not less than those of other judicial tribunals, subject to attack in courts of equity, not, indeed, for the purpose of showing them to be erroneous or irregular, but of proving that they were obtained under such circumstances that relief ought to be granted against them to the extent of setting aside the sales, or requiring persons acquiring title under them to hold it as trustees, or to otherwise so act that equity shall not be offended: *Van Horn v. Ford*, 16 Iowa, 578; *Grant v. Lloyd*, 12 Smedes & M. 191; *Hull v. Voorhis*, 45 Mo. 555; *Lander v. Abrahamson*, 34 Neb. 553, 52 N. W. 571. Where suit was commenced by creditors of a decedent to set aside for fraud a sale of his property authorized and confirmed by a probate court of Louisiana, the supreme court of the United States said: "The administration of General Morgan's succession undoubtedly belonged to the probate court of the parish of Carroll, and, in a general sense, it is true that the decisions of that court in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud, whether committed in pais or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors in proceedings in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it": *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. Rep. 619, 27 L. ed. 547.

IV. Decrees of Distribution.—In many of the states, courts whose orders and decrees we are here considering are authorized and required, after the settlement of the estate of a decedent, to make a decree distributing the property remaining undisposed of among

the heirs, devisees, and other parties entitled thereto, and the statutes conferring this authority impart conclusive effect to the action of the court, to the end that thereafter there shall be no question remaining respecting the persons entitled to such property. As in every other judicial proceeding, fraud may be employed, mistakes may occur, or accidents may prevent the due presentation of the claims of the persons entitled, and an adjudication may result which equity will not allow to be enforced. It may declare that the person in whose favor a decree of distribution is, or his successor in title with notice, holds the property in trust for an heir or other person to whom it should have been distributed (*Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Maney v. Casserly*, 134 Mich. 252, 96 N. W. 478), or in some jurisdictions the decree of distribution may be set aside so far as inequitable: *Benson v. Anderson*, 10 Utah, 135, 37 Pac. 256; *Beem v. Kimberly*, 72 Wis. 343, 39 N. W. 542.

V. Orders Granting Probate of Wills and Letters of Administration. There is no doubt that courts of equity have always disclaimed jurisdiction over the probate of wills and have refused to cancel or set aside such probate though assailed on the ground that the wills in question were forgeries, and their admission to probate had been procured by fraud and perjury: *Watson v. Bothwell*, 11 Ala. 650; *Ewell v. Tidwell*, 20 Ark. 136; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814; *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058; *Hughey v. Sidwell's Heirs*, 18 B. Mon. 259; *Lyne v. Marcus*, 1 Mo. 410, 13 Am. Dec. 509; *Graland v. Smith*, 127 Mo. 583, 28 S. W. 195, 29 S. W. 836; *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *McDowall v. Peyton*, 2 Desaus. 313; *Archer v. Meadows*, 33 Wis. 166; *Traver v. Traver*, 9 Pet. 174, 9 L. ed. 91; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327, 27 L. ed. 1006; *In re Broderick's Will*, 21 Wall. 504, 22 L. ed. 599; *Allen v. McPherson*, 1 H. L. Cas. 191; *Kerrick v. Bransby*, 1 Brown P. C. 588; and the same rule has been applied to grants of letters of administration: *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. Rep. 369, 34 L. ed. 1054. There is doubtless much in the opinions in these cases from which the inference might be supported that, under no circumstances, can any relief be had in equity from an order admitting a will to probate. It must be remembered, however, that every ground upon which relief in equity might be urged is also available in the probate court in opposition to the probate of a will, and that in most, if not all, of the states a considerable period of time is allowed after such probate in which applications for its revocation may be made. In nearly, if not in all, of the cases cited, the persons seeking relief were guilty of laches in long delaying their application for such relief, or in failing without adequate excuse in the court having jurisdiction of the probate of the will to take advantage of the

remedies there available to them. Hence, we think none of these cases warrants the broad proposition that in no event can relief in equity be obtained against the probate of a will. Of course, it may be conceded that, unless specially authorized by statute, a court of equity cannot directly cancel or set aside such probate. This, however, is by no means conclusive of the question. It was, and perhaps still is, the rule that a court of equity could not and would not attempt to set aside a judgment at law. This, however, did not prevent it from granting effective relief in personam. Relief of this character would, doubtless, in many instances practically annul the probate of a will, or, at least, prevent its inequitable operation. The right to proceed in equity against the probate of wills has been given by various American statutes which we shall not here undertake to summarize: *Sharp v. Sharo*, 213 Ill. 332, 72 N. E. 1058; *Bartlett v. Manor*, 146 Ind. 621, 45 N. E. 1060; *Pryer v. Howe*, 40 Hun, 383; *Ocobock v. Eells*, 37 N. Y. App. Div. 114, 55 N. Y. Supp. 1118; *Dillard v. Dillard*, 78 Va. 208; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346. Where, upon the trial of an issue *devisavit vel non*, a will was set aside, it was held that relief might be granted in equity and the probate of a will reinstated upon proof of fraudulent combinations between the proponents and the contestants: *Smith v. Harrison*, 2 Heisk. 230.

The question remains whether, though the probate of a will cannot be set aside in equity, some other adequate relief may not be there obtained, as by declaring the party receiving the benefit of the will to be a trustee holding in trust for those who have been defrauded by its probate. That this may be accomplished has been intimated in certain English and American cases: *Barnesly v. Powell*, 1 Ves. Sr. 284; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; and necessarily determined in *Smith v. Boyd*, 127 Mich. 417, 86 N. W. 953. The bill, in this case was to set aside certain codicils to a will on the ground of fraud, and for an accounting. A demurrer to the complaint was overruled, and the defendants appealed. The bill stated that the complainant was a grandchild of W. M., deceased, and that the defendants were his children and grandchildren, and they, with the complainant, constituted his heirs at law; that complainant's mother died when he was about eight months old, and that at the age of seven years he went to live with his grandfather, with whom he remained until the death of the latter; that the grandfather, when complainant was five years of age, made a will, and that several years later, and when the grandfather was in feeble health and of unsound mind, he was, by undue influence, fraud, and deceit, induced to change his will to the prejudice of the complainant; that in July, 1889, the grandfather died, and the will and codicils were admitted to probate on the petition of one of the defendants; that the complainant had no general guardian; that his father was absent from the state; that no guardian ad

litem was appointed, and that complainant had no knowledge of the proceedings in the probate court. The defendants, in support of their demurrer, insisted that the proceeding in the probate court was substantially in rem, and that the remedy was by appeal. The supreme court affirmed the judgment overruling the demurrer to the bill apparently on the ground that the complainant was without any remedy in the probate court, and that his case was to be treated substantially as if it were one to set aside the settlement of an account in the probate court when obtained by fraud. So far as the opinion of the court shows, there was no consideration by it of the English and American authorities with which its conclusions seemed to conflict.

VI. Limitations.—The limitations upon the right to obtain relief in equity from orders and decrees of probate courts and other tribunals exercising a like jurisdiction is the same as when relief is sought from judgments at law. Equity will not assert a mere revisory jurisdiction by attempting to correct or relieve from mere errors or irregularities, there being otherwise no sufficient ground for the interposition of equity: *Seals v. Weldon*, 121 Ala. 319, 25 South. 1021; *Greely Burnham G. Co. v. Graves*, 43 Ark. 171; *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61, 25 Pac. 67; *Ratliff v. Magee*, 165 Mo. 461, 65 S. W. 713; *Froeblich v. Lane*, 45 Or. 13, ante, p. 634, 76 Pac. 351; *Gee v. Humphries*, 28 S. C. 606, 5 S. E. 615; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16. Nor will it act where the complainant still has an adequate remedy in the courts having jurisdiction of the estate: *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 985; nor where he has been guilty of laches, either in not presenting his claims and not pursuing his remedy in that court, or in not seeking his remedy in equity within a reasonable time after having notice of his rights and of the wrongs of which he complains. In other words, he must always aver and prove facts which excuse his not appearing and protecting his interests in the court of probate: *Moore v. Lesueur*, 33 Ala. 237; *Lyne's Admr. v. Wann*, 72 Ala. 43; *Boswell v. Townsend*, 57 Ala. 308; *Tynan v. Kerns*, 119 Cal. 447, 51 Pac. 693; *Froelich v. Lane*, 45 Or. 15, ante, p. 634, 76 Pac. 351; and where sufficient cause exists for resorting to equity, he must proceed with reasonable diligence; otherwise relief will be denied him because of his laches: *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *Tucker v. Stewart (Iowa)*, 86 N. W. 371; *Duryea v. Granger's Estate*, 66 Mich. 593, 33 N. W. 730; *Williams v. Petticrew*, 62 Mo. 460; *Slaughter v. Cannon*, 94 N. C. 189; *Handley v. Snodgrass*, 9 Leigh, 484; *Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831; *Eames v. Manly*, 54 C. C. A. 561, 117 Fed. 387. Furthermore, if fraud is relied upon, it must be extrinsic or collateral to the questions examined and determined in the adjudication complained of: *Gruwell v. Seyboldt*, 82 Cal. 10, 22 Pac. 938; *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381;

Hanley v. Hanloy, 114 Cal. 690, 46 Pac. 736; Mukahey v. Dow, 131 Cal. 73, 63 Pac. 158; Sohler v. Sohler, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282. The strict application of this rule must prevent the award of all relief in equity, for such relief is never granted, unless the adjudication complained of is unjust, and the only method by which its unjustness can be established is by re-examination of the issues involved. Thus, where an executor or administrator presents and obtains an allowance of his accounts, and relief in equity is sought therefrom, it must always be alleged and proved that the account as presented and allowed is unjust, as well as that there was some fraud, accident, or mistake to which the allowance was due, and yet all the cases cited in subdivision II show that, in a proper case, relief may be obtained, though it must necessarily involve a re-examination of the question. The same may truly be said where relief is sought and obtained from a decree of distribution or an order directing the sale of property of a minor or decedent.

In no part of the proceedings in probate is there more temptation to fraud or more opportunity to successfully employ it than in proceedings to set aside to the widow property to which she claims to be entitled, either because it was a homestead of the decedent selected by him in his lifetime, or ought to be selected as her homestead, because he had never made any selection. There are several cases denying relief from orders setting aside a homestead on the ground that the fraud complained of was not extrinsic, and that the court hence could not proceed without the re-examination of issues already tried and determined: Fealey v. Fealey, 104 Cal. 355, 43 Am. St. Rep. 111, 38 Pac. 49; Wickersham v. Comerford, 104 Cal. 494, 38 Pac. 101; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736. The case last cited is an extreme one, and, if carried to its logical result, should prevent relief being granted in nearly, if not in all, cases where fraud is practiced in probate proceedings. The action was brought to set aside a decree in the administration of the estate of Patrick Hanley, deceased, by which certain property was set aside to his widow as a homestead; and the complaint, among other things, alleged that the premises were the separate property of the deceased, that his widow willfully, falsely, and fraudulently represented to the court, and testified, that they were community property; and also falsely represented to it that a certain declaration of homestead had been filed on the premises while she and her deceased husband were actually residing thereon; and it was further contended that the complainants had no notice of the proceeding to set aside the homestead. A demurrer to the complaint was sustained, on the ground that the proceeding, being in rem, all parties interested were bound by it without personal notice, and that the fraud alleged was not extrinsic or collateral to the matter which was tried and determined by the court. As the question was presented upon demurrer, there was no sug-

gestion that the widow testified as she did through any mistake; on the contrary, the demurrer necessarily admitted that she acted willfully, fraudulently, and falsely. Proceedings of this character are ordinarily *ex parte*, and we do not think that the rule to which we refer should be applied to them where such is the case. As those who are adversely interested are not present in court and usually have no actual knowledge of the proceeding, it ought to be regarded as a fraud, entitling them to relief when one, taking advantage of their absence, willfully misrepresents facts to the court, though the facts so represented involve the merits and go to the very foundation of the proceeding. The case of *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282, though it does not profess to overrule any of the decisions referred to, seems to be necessarily in conflict with them, unless it can be said that the principles applicable to decrees of distribution differ from those applicable to orders setting apart homesteads. In the case last cited relief was obtained from a decree of distribution, on the ground that a widow conspired with her son, who was not the son of the decedent, to procure for him a share of the latter's property as one of his children, filed a petition naming him as such, and obtained a decree in accordance therewith. The court proceeded, however, partly upon the ground that the widow, being the executrix of the decedent, was the trustee of all the heirs and of other parties in interest, was the mother and natural guardian of such heirs, and was obligated to protect their legal rights and see that the legal claims to the estate were properly presented to the probate court.

LIVESLEY v. JOHNSTON.

[45 Or. 30, 76 Pac. 13, 946.]

APPEAL AND ERROR.—An Appeal will not be Dismissed in a Suit for Specific Performance on the Ground that the Property has been Taken Beyond the Jurisdiction of the Court and a decree respecting it cannot be effective. (p. 650.)

SALES—Right of Inspection.—Ordinarily, a purchaser of a commodity has the right of inspection upon delivery before acceptance, and if it does not correspond in kind, quality, condition, or amount to that which was contracted for, he may reject it, but if he rejects when it comes up to the stipulated standard, he does so at his peril, and the seller may recover the purchase price on proof of his compliance with the contract of sale. (p. 654.)

SALE, Right to Reject, When may not be Capriciously Exercised.—If a contract for the sale of hops to be grown in the future provides if they are, or shall in any case be, of lesser quality than choice, or not delivered in the condition agreed upon, the purchaser or his agents, after first determining that they are not choice or

in good condition, shall be released from all further obligation on such contract, this does not entitle him to reject the hops capriciously or without sufficient reason. (p. 657.)

SPECIFIC PERFORMANCE—Contract, When not Unilateral
The fact that a contract for the sale and purchase of hops gives the purchaser or his agent the right to determine whether they are of a quality and condition provided for in the contract and then to refuse to receive them, does not make the contract unilateral. It is not a mere option, but a positive obligation, to purchase, unless in the honest judgment of the purchaser or his agents, fairly exercised, the hops are not of the quality or not in the condition contracted for. (pp. 657, 658.)

SPECIFIC PERFORMANCE of a Contract to Deliver Chattels will not ordinarily be granted, for the reason that there is a plain, speedy, and adequate remedy at law. (p. 659.)

SPECIFIC PERFORMANCE of a Contract to Deliver Chattels will be Decreed if an award of damages will not put the complainant in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages must fall short of the redress to which he is entitled. (p. 659.)

SPECIFIC PERFORMANCE of a Contract to Deliver Chattels cannot be Maintained Solely on the Ground that the Vendor is Insolvent, but the fact of insolvency, when combined with other causes for equitable interposition, may become a potent, and even a controlling, factor in determining the fact of jurisdiction. (pp. 659, 660.)

SPECIFIC PERFORMANCE of a Contract for the Sale of Hops.—A contract whereby the vendor sells hops to be grown by him for a series of years, to be of choice quality and in good condition, such quality and condition to be determined by the purchaser, who stipulates to make advances at designated times in each year for the cultivation and picking of the hops, and to pay nine and a half cents per pound therefor when delivered, will be specifically enforced at the suit of the purchaser, if the hops have been produced, especially when the seller is insolvent. (p. 661.)

SPECIFIC PERFORMANCE of a Contract for the Sale of Hops to be Produced in the Future will not be Denied on the ground that it does not appear that the seller, at the time of entering into the contract, owned the land on which the hops were to be raised, or had a lease thereof, or otherwise had a potential interest in the crop to be produced. This will be presumed. (p. 661.)

SPECIFIC PERFORMANCE will not be Denied on the Ground that the Seller has not Produced Articles of the Quality Contracted for, if it appears that the purchaser is willing to accept what the defendant has produced. (p. 661.)

Suit for the specific performance of a contract to sell hops. A demurrer to the complaint was sustained, and the plaintiff appealed. A motion to dismiss the appeal was made.

Teal & Minor, W. T. Slater and William M. Kaiser, for the appellants.

Peter H. D'Arcy, Carson & Adams and George C. Bingham, for the respondents.

32 WOLVERTON, J. 1. The purpose of the present suit is to require the specific performance of a contract made and entered into by and between plaintiffs and defendant Johnston for the purchase and sale of one hundred and ten bales of hops, which were to be, and were, grown and produced by Johnston. The complaint contains the usual allegations of performance on the part of the plaintiffs, but avers that defendant Johnston refused to comply with the stipulations on his part to deliver the hops to plaintiffs as contracted. It is further alleged that the defendants, Adolf Wolf & Son, claim to have a lien upon the hops, and the defendant, the Southern Pacific Company, has them in its possession, having been delivered to it by Johnston. The prayer is for a temporary **33** injunction restraining the defendants, or either of them, from selling or disposing of the hops or removing them from their present place of storage until the final determination of the suit, and for a decree requiring the specific performance of the contract for the delivery of the hops by defendants to plaintiffs. The injunction was allowed as prayed, to be and continue in force and effect until the further order of the court. Subsequently a demurrer was interposed to the complaint, and sustained, whereupon a decree was entered dismissing the suit and dissolving the injunction. From this decree plaintiffs have appealed, having given notice thereof in open court at the time of its rendition.

The defendants now move to dismiss the appeal, basing their motion upon a showing that the defendant Johnston has since the decree disposed of the hops, which have been shipped out of the state and beyond the jurisdiction of the court. The contention is that, as the subject matter of the suit has been disposed of and taken beyond the jurisdiction of the court, the decree respecting it could not become effective or operative, and hence the appeal should be dismissed. This seems to us to mistake the real issue, which is whether Johnston should or should not be required to perform his contract. Whether the hops are still within the custody of the law or not is not the question. The suit could as well have been commenced without as with the injunction, and all the issues tried out and the cause fully determined. The injunction is allowed under the statute as a provisional remedy: Bellinger & Cotton's Compilation, sec. 417. It is an auxiliary proceeding, and was resorted to in the present instance to preserve the status quo of the property during the pendency of the suit, so that plaintiff, if successful, might be the better enabled to enforce their decree. The enforcement of the

decree, however, is ³⁴ no part of the cause of suit, and the probable insusceptibility of its enforcement affords no reason why a person may not obtain the decree if he desires to be at the pains; so that the plaintiffs here have the right to their decree if their cause of suit is well founded, notwithstanding Johnston has disposed of the hops and the court is unable to reach them with its process. Whether he had a right to do this in the face of the appeal, or what effect the appeal may have had upon the status of the injunction, are matters with which we are not at present concerned. It is sufficient that Johnston could not determine the cause of the suit by his own act in rendering the decree more difficult of enforcement, if one should be finally obtained against him. What he did was not effective to determine the suit or controversy in any sense, and the cause yet remains to be disposed of. The many authorities cited by counsel are inapplicable to the present conditions, they being cases where, by reason of the action of the parties or the efflux of time, there was no real controversy left for determination.

The motion to dismiss will therefore be denied.

ON THE MERITS.

WOLVERTON, J. This is a suit to require the specific performance of a contract or agreement for the sale of hops, entered into September 5, 1902, between the defendant Johnston, of the first part, and the plaintiffs, T. A. Livesley & Co., of the second. That portion of it material to the controversy is as follows:

"That said party of the first part, for and in consideration of the sum of one dollar in hand paid by the ³⁵ parties of the second part, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does grant, sell and convey and agree to deliver unto the parties of the second part, twenty thousand pounds of hops of the crops to be raised and grown by the party of the first part at or near Woodburn in each of the following years: 1903, 1904, 1905, 1906, 1907, on the following described real estate, which is owned by Frank Chappelle, Melane Chappelle and Peter Deltaur [describing it], and to deliver the said hops in each of said years at Woodburn depot or on board cars free of charge, at such time between the 1st and 31st of October of each of said years as the parties of the second part may direct, each bale of said hops to contain from one hundred and eighty to two hundred twenty pounds of hops (seven pounds tare per bale to be allowed), and are to be put up in new twenty-four ounce bale cloth. The

said hops shall be of choice quality, of even color, well and cleanly picked and well cured, but not high or slack dried, and not broken or moldy.

"The said parties of the second part agree to advance to the said party of the first part for the purpose of cultivating, two hundred fifty dollars on or about April, May and June, and for picking purposes at and during picking time of September of each of said years, the sum of four and a half cents per pound, and for such advances a lien is hereby granted to parties of the second part on said crop of hops prior and preferable to all other liens; and upon the delivery and acceptance of said hops, the said parties of the second part will pay in current funds of the United States or their equivalent at Salem, Oregon, the balance due on said hops at nine and one-half cents per pound, that being the agreed price for said hops, and all money advanced for the purposes aforesaid is to be deducted from the purchase price of said hops. The advances made for cultivating shall bear interest at the rate of eight per cent, and advances made for harvesting purposes at the rate of eight per cent.

"Should said hops be from any cause of a lesser quality than choice, or not delivered in the condition herein agreed upon according to the judgment of said parties of the second part or their agent, the party of the second part shall nevertheless have the privilege of taking the ³⁶ same, or so many of them as will cover the amount advanced on said crop of hops, with interest at the rate of eight per cent per annum, at a reduction in price equal to the difference in value between such hops and choice.

.....

"The party of the first part shall not be liable (except to repay advances) for any shortage on delivery due to causes beyond his control. It is furthermore agreed that the party of the second part, through their agents shall have the right to determine at picking time when said advances are contemplated to be made, whether or not the growing crop at that time is in proper condition, and if such agents of the party of the second part shall determine that the growing crop is not in such condition, that said party of the second part shall be released from any obligation to furnish any picking money as called for in this contract."

The succeeding clause of the agreement is in effect a chattel mortgage upon the hops to secure the buyer in the repayment of moneys advanced or to be advanced the grower in pursuance of the agreement.

The complaint sets out, among other things, the entering into the agreement by the parties; that, as part consideration for the execution thereof plaintiffs paid to Johnston the sum of one dollar and also surrendered up and delivered to him certain promissory notes due and payable to the plaintiffs, of the face value of six hundred and fifty dollars; that plaintiffs have performed and have been at all times ready and willing to perform all the agreements and covenants upon their part, and have offered and tendered to Johnston the advances required to be made by them, but that Johnston some time early in the year 1903 notified the plaintiffs that he would not accept any advances, and declared that he would no longer be bound by the terms and conditions of the agreement, and has continuously refused to deliver to plaintiffs the hops produced for the year 1903, consisting of one hundred and ten bales, of the aggregate weight of twenty thousand pounds; that defendant Johnston is wholly insolvent and unable to respond in damages for the breach of his agreement,³⁷ and plaintiffs have no plain, speedy, and adequate remedy at law. The purchase price is tendered into court, and a decree demanded that Johnston be required to perform by delivery to plaintiffs of the hops designated. A demurrer was interposed to the complaint and sustained, and, the complaint having been dismissed, the plaintiffs appeal.

⁴¹ 2. In support of the demurrer it is first insisted that the contract or agreement set out, upon which the suit is founded, and which it is sought to have specifically performed, is lacking in the essential of mutuality of obligations between the contracting parties, and is therefore without validity or binding effect. The plaintiffs stand upon the agreement, and, of course, assert its legal efficacy. They insist, first, that it does contain mutual obligations which alone render it binding upon both parties; but, if not, that it at least has the force and effect of an option accorded the plaintiffs to purchase the hops, founded upon a sufficient consideration to support it. A promise founded upon a good consideration rendered at the time is obligatory and enforceable. A loan of money and simple contract debts are familiar instances of the kind. The promise to repay the money or to discharge the debt becomes binding and obligatory by reason of the promisor having received a consideration for making it. When, however, a promise, by whatever reason, has become binding, it is more aptly termed an "obligation." But a promise of material import will support a counter promise and vice versa. When mutually entered into,

they operate one as a consideration for the other, thus constituting an agreement binding and obligatory upon both parties. Where the agreement is wholly executory, it is essential that the obligations be mutual, else there is no consideration for its support, and it is but a mere nudum pactum. These simple principles, aptly applied, will aid us largely in the present controversy.

The contract is between a producer of hops, on the one part, and dealers in that commodity, upon the other. Its terms unmistakably import a sale of the hops to the amount of twenty thousand pounds, to be grown by Johnston in each of the five years designated, and an agreement upon his part ⁴² to deliver them at Woodburn, on board the cars, free of charge, at such time during the month of October as the second parties may direct. The manner in which the hops shall be baled and their quality are specifically defined. This is a clear and absolute undertaking on the part of the seller. The correlative and reciprocal promises on the other part are that the second parties will advance to the first party two hundred and fifty dollars on or about April, May, and June of each year for cultivating purposes, and four and one-half cents per pound for picking purposes during picking time, in September, and, upon delivery and acceptance of the hops, that they will pay the balance due thereon at nine and one-half cents per pound, that being the agreed price for the product, all moneys advanced to be deducted from the purchase price. If the contract rested here, nothing else being said, no other provisions made, there could be no cavil or controversy touching its validity and binding effect. It would have then simply been a sale of the hops to be grown, with an agreement to deliver on the one part, and an undertaking on the other part to advance two hundred and fifty dollars for the purpose of cultivating, four and one-half cents per pound for picking purposes and to pay nine and one-half cents per pound for the hops upon delivery and acceptance, reserving the right, as was natural, to deduct advances made from the purchase price, paying merely the balance due. The promises of the parties would then have been mutual—that upon the one hand supporting those upon the other and vice versa, thus creating correlative and reciprocal obligations—and the contract would unquestionably have been perfectly valid and binding upon both parties. But the promises upon the part of Livesley & Co. to advance picking money and accept the hops are materially qualified by subsequent conditions of the con-

tract, and all its provisions must be construed together to arrive at its true intendment. They are interdependent in character, and none can be eliminated without destroying ⁴³ the contractual intendment and relationship of the parties. Should the hops be, from any cause, of lesser quality than choice, or not delivered in the condition agreed on, "according to the judgment" of Livesley & Co. or their agent, the contract accords them the privilege, nevertheless of taking the same, or so many thereof as would be sufficient to cover the advances made on the crop, at a reduction in price of the difference in value between such hops and choice; and it was further stipulated that Livesley & Co. should, through their agent, have the right to determine at picking time whether or not the growing crop was in proper condition, and, if found not to be so, then that they should be relieved from making the stipulated advances of picking money. Thus analyzed, we are enabled to comprehend at a glance the essential features of the contract.

Now, the strong contention of counsel for defendants is that the stipulation that if the hops should be of lesser quality than choice, or not in condition as agreed upon, "according to the judgment" of Livesley & Co. or their agent, accorded to them the right or privilege of taking the crop, or not, subject to their mere will or caprice, thus nullifying their promise to purchase, and rendering it of no appreciable obligatory or binding effect upon them. And so with the contemplated advances of picking money. They assert that it was left entirely to their consideration, to be governed by their mere choice or pleasure in the premises. Ordinarily, the purchaser of a commodity has the right of inspection upon delivery before acceptance, and, if it does not correspond in kind, quality, condition or amount to that which is purchased or contracted for, he may reject it: Benjamin on Sales, 7th ed., secs. 695, 701; 2 Mechem on Sales, secs. 1210, 1211, 1375, 1376. The purchaser is conceded the exercise of his judgment, but he exercises it at his peril, and, if he rejects the commodity, ⁴⁴ which nevertheless comes up to the stipulated standard, he is yet bound for the purchase price, and the seller may recover it of him on proof that he has complied with the terms of the sale. Many cases are to be found where work is agreed to be done, articles furnished, or goods delivered upon sale, to the satisfaction of another, and it is uniformly held that the person to be benefited may exercise his choice of rejection or acceptance without assigning any reason therefor. That he ought to be satisfied, or that the work, articles or goods

would be satisfactory to a reasonable man or to a court or jury, will not avail as against the exercise of his convictions of sentiment. It is sufficient that he is not satisfied, and his own determination must be taken as final and conclusive. The cases proceed upon the assumption that the buyer has thus reserved to himself an unqualified option, not being willing to leave his freedom of choice to any contention or subject to any investigation whatever, and whatever decision he arrives at determines the controversy. If the question is one appealing to taste, sentiment or artistic sensibility, as where the undertaking is to supply a portrait, bust, suit of clothes, musical instrument, article of furniture or the like, it is, of course, the duty of the buyer to examine the subject of the purchase, and not to reject it unseen, but his determination upon examination cannot be questioned. Where, however, the agreement is to supply a machine which is to work to the satisfaction of the vendee, a reasonable test is required and he must act in good faith and with honesty of purpose, and cannot be heard to express dissatisfaction which is wholly feigned or simulated. So it has been held in this class of cases that where the purchaser was in fact satisfied, but fraudulently, and in bad faith declared that he was not, he is bound nevertheless, and must respond for the purchase price. "It is quite permissible," says Mr. Justice Bryan, of the supreme court ⁴⁵ of Maryland, "to parties to enter into such contracts; and where the approval or satisfaction of the party is made a condition precedent to the right to receive compensation, or the contract price, for the article to be delivered, the court has no right or power to dispense with the condition": *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198, 226, 57 Am. Rep. 318, 9 Atl. 126, 127. And their validity seems to be unquestioned: 1 *Mechem on Sales*, secs. 663-668; *Campbell Print. Press Co. v. Thorp* (C. C.), 36 Fed. 414, 1 L. R. A. 645; *Silsby Mfg. Co. v. Town of Chico* (C. C.), 24 Fed. 893; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Wood etc. Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57, 15 N. W. 906; *Manufacturing Co. v. Brush*, 43 Vt. 528; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583.

There is another class of cases where the article sold or the work to be done or performed is to be subject to the approval of, or to be satisfactory to, some third person, and in many instances that person is the agent or employé of one or the other

of the parties to the contract. In cases of this character the approval of the party so designated becomes a condition precedent to a recovery for the price. He must, however, have acted in good faith and with an honest purpose, and cannot arbitrarily or capriciously exercise his judgment. If he violates his duty in this regard, a recovery may be had, in the absence of his approval, for the nonacceptance of the articles furnished. But in the absence of fraud or bad faith in the conduct of such party in respect of his approval or the withholding of it, his judgment or determination is to be accepted as final and conclusive. No mere error or mistake of judgment will vitiate his determination, the object of his appointment being to prevent and exclude contention ⁴⁶ and litigation. Such is said to be now the settled doctrine touching this class of contracts in the courts both of this country and England: *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198, 9 Atl. 126, 57 Am. Rep. 318. See, also, *Lynn v. Baltimore & Ohio R. Co.*, 60 Md. 404, 45 Am. Rep. 741; *Kihlburg v. United States*, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. Rep. 344, 27 L. ed. 1053; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. Rep. 1035, 29 L. ed. 255. We have had occasion to consider cases of this kind, of which *North Pac. etc. Co. v. East Portland*, 14 Or. 3, 12 Pac. 4, *Chance v. City of Portland*, 26 Or. 286, 38 Pac. 68, and *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126, are instances. In the latter case a building contract was involved, whereby it was stipulated that the builder should perform his work subject to the approval of the architect. Contracts of this nature are usual and frequent. The two former cases were concerning certain street improvements in the city of Portland, which were to "be completed to the satisfaction of the common council." In the first of these cases Mr. Justice Thayer, commenting upon the effect of the contract, says: "I think there must be a distinction between a contract in which the work is not to be paid for until a certificate is produced from some third person, showing that it has been performed in accordance with the provisions of the contract, and one in which it is to be paid for upon its approval and acceptance by the party for whom it is performed. In the former case the production of such certificate is a condition precedent to the right to demand the payment, and the party seeking to enforce payment must aver and prove its performance. In the latter case it is the duty of the party to approve and accept the work, if performed substantially as required by the

contract, for certainly the law will not permit such party to capriciously withhold his approval in such case, and thereby avoid the payment of a just ⁴⁷ claim." In *Baltimore & Ohio R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318, 9 Atl. 126, the defendant agreed to furnish coal to the plaintiff of a quality that should be satisfactory to plaintiff's master of transportation and master of machinery, virtually its agent, and the stipulation was upheld, which is coming very near to the condition of the present contract. But in *Campbell Print. Press Co. v. Thorp*, 36 Fed. 414, 1 L. R. A. 645, Mr. Justice Brown, who is now on the supreme bench of the United States, says: "We know of no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive"; and such was practically the case in *Fletcher v. New Orleans etc. R. Co. (C. C.)*, 19 Fed. 731, and *Dustan v. McAndrew*, 44 N. Y. 72.

Within the undoubted doctrine of these cases, the contract under consideration was one which the parties had a right to enter into, and the clause leaving the quality and condition of the hops at the time of delivery to the judgment of the buyer does not render it void of mutuality. *Livesley & Co.* could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves, or through their agent, so rejected them, they would nevertheless be bound for the price. Being a party and passing judgment upon their own case, good morals and decent propriety would suggest that they act with circumspection and a considerate regard for the rights of the seller as well as their own, and the law will look with greater scrutiny upon their determinations than if they were wholly disinterested arbiters. While this condition qualifies to a certain extent the promise to accept and pay for the hops, if choice in quality and in good condition, as agreed upon, it does not, by negation, destroy the efficacy of the promise. If the sale had been the ordinary one of goods or chattels, ⁴⁸ the buyer, as we have seen, would have exercised his judgment as to rejection at his peril, and the goods or chattels could be shown notwithstanding to be of the quality and condition agreed upon. In a sale like the one at bar, the buyer must also accept, unless, in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the parties have so agreed; but if he exercises his judgment arbitrarily, capriciously or fraudulently,

with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination. The undertaking of Livesley & Co. is not, therefore, a mere option to take the hops or not, but a positive obligation to purchase, unless, in their honest judgment, fairly exercised, they are not of the quality or in the condition contracted for. In the respect considered, we are firmly of the opinion that the contract is mutual and binding. If the hops are not, in their honest judgment, up to the agreed standard, then they are accorded the privilege or option of purchasing, or not, as they may desire; and this provision, when compared with the one just discussed, indicates very clearly the distinction that exists, and that which the parties themselves declared, between the agreement to purchase and a mere option to purchase, as may suit the wish of the buyer.

The same considerations apply alike to the obligation to advance picking money. It was not left to the mere option of Livesley & Co. to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for. The purpose of this stipulation is apparent. Livesley & Co. would hardly be expected to advance money upon a contemplated product when it was manifest that it ⁴⁹ would not come up to the standard in quality contracted for, and would furnish, at best, doubtful security for the repayment of the advances. But aside from these considerations, there is the obligation to advance two hundred and fifty dollars on or about April, May, and June of each year for cultivating purposes, which is unconditional; and when all the conditions are construed together, including the chattel mortgage element, which is intended as security for repayment of advances made in case a sale is not consummated, we are impelled to the conclusion that the contract is mutual, and therefore valid and binding upon the respective parties. In view of these considerations, it is not necessary for us to determine whether or not, if the contract of Livesley & Co. was a mere option to purchase, it is supported by a sufficient consideration. Nor have we considered what would be the effect on the sale had Livesley & Co. declined to advance picking money, as it does not seem to be involved in the present controversy.

3. The next question presented is whether a court of equity has jurisdiction to decree a specific performance, by requiring

a delivery of the crop of hops produced for the year 1903, to the amount of twenty thousand pounds. It may be said that equity will not ordinarily grant relief for the specific delivery of chattels, because it is generally considered that the plaintiff has a plain, speedy and adequate remedy at law for damages for withholding them. The interposition of equity is not withheld except upon this particular ground, as its jurisdiction is as ample to decree the specific performance of an agreement relative to personalty as it is one relative to realty: *Sullivan v. Tuck*, 1 Md. Ch. 59; *Frue v. Houghton*, 6 Colo. 318; *Duff v. Fisher*, 15 Cal. 376; *Mechanics' Bank v. Seton*, 26 U. S. (1 Pet.) 299, 7 L. ed. 152; *Mason v. Patterson*, 74 Ill. 191; *Kirksey v. Fike*, 27 Ala. 383, 62 Am. Dec. 768; *Barnes v. Barnes*, 65 N. C. 261. The ⁵⁰ remedy at law, however, which will bar such relief, must be as practical and efficient to the ends of justice and its prompt administration as in equity, or, to employ the language of Mr. Chief Justice Fuller in *Gormley v. Clark*, 134 U. S. 338, 339, 10 Sup. Ct. Rep. 554, 557, 33 L. ed. 909: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances": *South Port. L. Co. v. Munger*, 36 Or. 457, 54 Pac. 815, 60 Pac. 5; *Benson v. Keller*, 37 Or. 120, 60 Pac. 918; *Wollenberg v. Rose*, 41 Or. 316, 68 Pac. 804; *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061. When, therefore, an award of damages would not put the party seeking equitable relief for the delivery of personalty in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages would fall short of the redress to which he is entitled, the jurisdiction is properly invoked; otherwise not: *Frue v. Houghton*, 6 Colo. 38; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317; *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584.

4. And it may be further observed that the insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance in this class of cases. There must be some other element or principle of equitable cognizance upon which the remedy is invoked: *Gillett v. Warren*, 10 N. Mex. 523, 62 Pac. 975; *McLaughlin v. Piatti*, 27 Cal. 451; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259. The fact of insolvency, when combined with other causes for equitable interposition, may, however, become a potent or even controlling factor in determining the fact of jurisdiction. The

principle is well stated by Mr. Justice Thompson in *Heilman v. Union Canal Co.*, 37 Pa. St. 100, 104, as follows: "The fact, if it be so, that this remedy may not be successful in realizing the fruits of a recovery at law, on account of the ⁵¹ insolvency of the defendants, is not of itself a ground of equitable interference. The remedy is what is to be looked at. If it exist, and is ordinarily adequate, its possible want of success is not a consideration. It is not intended here to say that insolvency is never a consideration moving a chancellor. It frequently does, but not alone. The equitable remedy must exist independently. In balancing cases, it is a consideration that gives preponderance to the remedy." To the same purpose, see *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733; *Parker v. Garrison*, 61 Ill. 250.

5. Now, turning to the contract in question, and considering the situation and relation of the parties, do we not find independent grounds for equitable interference to grant relief by way of specific performance? We have already discussed the salient features, terms and conditions of the contract, and have found it to be valid and binding between the parties. It covers a period of five years, and was made at a time, presumably, when Johnston was obtaining fair value for his hops—otherwise we must assume that he would not have entered into the relationship—and there is only one reason at this date why it may be considered to be a hard contract as to him, and that is that hops are worth more now in the market than they were then. Another suggestion in this connection: The commodity fluctuates greatly in the market, and it may have been a controlling circumstance that Johnston considered that nine and one-half cents per pound for the hops raised by him during the five years designated would be a good average price for the time, and hence, upon the whole, a profitable undertaking. But the undertaking to produce the hops was not solely his own. Under the agreement, Livesley & Co. were to contribute to the expense of their production; that is to say, they were to advance money for the purposes of cultivating and picking, amounting to more than one-half of the agreed value of the product, which was to become ⁵² a lien thereon. In a sense, the venture was a joint one between the parties, where one was to provide the ground and bestow his labor, and the other to furnish the necessary funds for carrying it on; the latter to be reimbursed their advances, with interest, in any event, however. The condition suggests a trust relationship between the parties, whereby the producer becomes, in a manner, a trustee of the buyer for the

delivery of the product of the joint enterprise to the amount designated, and the contract has reference to the specific property to be produced under its terms. Further than this, it is alleged that plaintiffs surrendered to Johnston his promissory notes to the amount of six hundred and fifty dollars as part consideration for his entering into the contract, and an award of damages would not fully compensate them. Coupling these conditions with the fact alleged that the defendant is insolvent, so that a judgment at law against him would be bootless and utterly insusceptible of enforcement, we are constrained to resolve the question in favor of the equitable jurisdiction to enforce the specific performance of the contract.

It is further urged that the remedy is not reciprocal, and ought not, therefore, to be sanctioned. But it seems clear that Johnston would also have a remedy to enforce specific performance, should Livesley & Co. capriciously and fraudulently refuse to approve of the hops, as to quality and condition, or to accept them, as there would be involved the question of fraud, which is especially within the cognizance of equity, and the procedure would be more efficient to the ends of justice than an action for damages for a breach of their obligation.

We are not to be understood as holding that the defendant may be required to perform the labor or carry on the project of producing the crops, but, after they have been produced, and the plaintiffs have contributed to their production as required by the terms of the agreement, or have ⁵³ at all times been ready and willing to do so, and have only been deterred therefrom by the acts of Johnston, they are entitled to have specific performance in delivery of the amount of the crop so agreed to be delivered.

6. Another point is made—that the complaint does not show that Johnston owned the land upon which the hops were grown, or held it under a lease, so as to give him a potential interest in the crop produced. But the reasonable inference is that he had it rented. The agreement shows that it was owned by Frank and Melane Chappelle and Peter Deltaur, and Johnston must have acquired some right from them to cultivate it—presumably by lease.

7. And still another—that the complaint does not allege that hops of the kind were grown or owned by the defendant Johnston. If, however, the plaintiffs are willing to accept the hops he has produced as of the quality and condition agreed upon, the defendants cannot be heard to complain.

In view of these considerations, the decree of the trial court will be reversed, the demurrer overruled, and the cause remanded for such further proceedings as may seem proper.

While Specific Performance of a contract for the sale of personalty will not ordinarily be decreed, it will be when the remedy at law is inadequate: *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409; *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811; *Steinmeyer v. Siebert*, 190 Pa. St. 471, 70 Am. St. Rep. 641; *Northern Cent. Ry. Co. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683. It is decided in Ontario etc. Assn. v. Cutting Fruit etc. Co., 134 Cal. 31, 86 Am. St. Rep. 231, that if a vendor, through no fault of his, is unable to deliver fruit of a specified variety, he cannot be compelled to supply another.

KELSAY v. EATON.

[45 Or. 70, 76 Pac. 770.]

PUBLIC LANDS—Title Under Timber Culture Act Before Full Compliance.—The initiatory steps taken to secure title to public land under the timber culture act do not constitute a grant in praesenti of the premises selected, but are equivalent to impelling the United States constantly to offer to the entryman a patent for the land if he fully complies with the conditions required. (p. 665.)

PUBLIC LANDS, Devisable Interest in, When does not Exist. **An Entryman Under the Timber Culture Act of the United States** has not, before receiving a final certificate, a devisable interest in the land. (p. 665.)

PUBLIC LANDS—Title of Heirs of Entryman.—Under the timber culture act, if an entryman dies before having fully complied with the law, his heirs may obtain title on complying with certain conditions, but they take by purchase and not by descent, and hence are not affected by any devise made by him. (p. 666.)

Moore & Gavin and A. C. Woodcock, for the appellant.

J. B. Hosford, for the respondent.

⁷⁰ MOORE, C. J. This is a suit by B. S. Kelsay against Alexander Eaton and others to quiet the title to real property. The facts are that, under the provisions of the timber culture act of the United States, one J. H. Eaton entered eighty acres of land in Sherman county; that, before making final proof, he died unmarried, and without issue, having devised all his ⁷¹ real and personal property to plaintiff, who was named as his executor; that the will was admitted to probate in that county, and letters testamentary were issued to plaintiff, who,

having duly qualified, made such proof as testamentary heir; that the patent for the land was issued to the heirs of the testator; and that the defendant, Alexander Eaton, the father of the deceased and his statutory heir, executed a deed of an undivided one-half thereof to the defendant, George W. Kinsey, who accepted it with record notice of plaintiff's claim to the real property. The cause, being at issue, was tried, resulting in a decree as prayed for in the complaint, and the defendants appeal.

⁷² The question presented by this appeal is whether an entryman under the timber culture act of the United States, before receiving a final certificate, has a devisable interest in the land. The amendatory act of Congress approved ⁷³ June 14, 1878 (20 U. S. Stats. 113, c. 190), prescribing the method of securing the title to public land under the timber culture act, so far as deemed material herein, is as follows:

"Section 1. That any person who has arrived at the age of twenty-one years, and is a citizen of the United States who shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter section of any of the public lands of the United States, or five acres on any legal subdivision of eighty acres, shall be entitled to a patent for the whole of such legal subdivision at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in section 2.

"Sec. 2. That the person applying for the benefits of this act shall, upon application to the register of the land district in which he or she is about to make such entry, make an affidavit, before the register or the receiver. And upon filing said affidavit with said register and said receiver and on payment of ten dollars, if the tract applied for is more than eighty acres; and five dollars if it is eighty acres or less, he or she shall thereupon be permitted to enter the quantity of land specified. That no final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from the date of such entry; and, if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and for not less than eight years, have cultivated and protected, such quantity and character of trees as aforesaid; that not less than two thousand seven hundred trees were planted on

each acre and that at the time of making such proof that there ⁷⁴ shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre, they shall receive a patent for such tract of land."

In *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 491, in construing the provision of the foregoing act, it was held that an entryman who died before making final proof had no devisable interest in the land, and that his heirs took the premises as donees of the United States, and not by inheritance from him. In deciding that case, Mr. Justice Temple, speaking for the court, says: "Obviously the privilege or right acquired by the entry and filing is personal, and cannot be transferred except as authorized in the act. The death of the applicant before performance renders him incapable of performance, and that event would end the claim, but for the provisions of the act, which authorize the heirs to prove that he or they has or have performed. Does the heir in such case take by inheritance from the applicant, or is he, by appointment in the act itself, a substituted beneficiary of the government to whom the title goes by direct grant? It is admitted at once that the condition of the applicant prior to full performance is in no wise analogous to that of a pre-emptor either before or after the pre-emptor has received his certificate of purchase. The applicant has a right to the land, of which the government cannot deprive him, but which will be lost if he fails to perform. And death before performance renders such failure certain, and ends the estate of the applicant. In view, however, of the hardship of such a result, the law continues its offer to certain persons whom it is presumed the applicant himself might have selected. But they take, not by inheritance from the deceased, but as grantees from the government."

The making and filing the required affidavit and paying the necessary fee entitle the entryman, under the timber ⁷⁵ culture act, to the possession of the land, which he holds by performing the conditions which the law imposes, and proof of his compliance with its provisions, within the time and according to the manner prescribed, give him a right to the issuance of a patent. Section 3 of the act under consideration provides "That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the pro-

visions of this act." The initiatory steps taken to secure a title to public land, under the timber culture act, do not constitute a grant in præsentis of the premises selected, but are equivalent to impelling the United States constantly to offer to the entryman a patent for the land, if he will fully comply with all the conditions required. His possession of the land, and the planting and cultivation of trees thereon, do not create an equity in his favor, analogous to a contract for the purchase of real property, that is measured by the value of the consideration partly performed; but his right is equivalent to a license that protects the improvements he may make, and guarantees to him a legal title to the premises, as a donation, if he will comply with the requirements which Congress has prescribed. If he fail in this respect, his rights under the timber culture act are extinguished. His death renders the performance of the conditions impossible, thereby forfeiting all his rights, and, as his interest in the land terminates with his life, there is nothing upon which his devise of the premises can operate, nor any estate therein which his heirs can inherit. A generous government, however, desiring to donate the land thus partly improved to those to whom it would by law descend if the claimant had died intestate and seised of the premises, has wisely enacted, by its representatives ⁷⁰ in Congress, that, if the entryman die before fully complying with all the requirements specified in the timber culture act, "his or her heirs or legal representatives" may make the required proof, whereupon "they shall receive a patent for such tract of land."

The phrase "legal representatives" in its ordinary acceptation means executors and administrators (*Cox v. Curwen*, 118 Mass. 198; *Grand Gulf R. Co. v. Bryan*, 8 Smedes & M. 234), though it may mean heirs, next of kin, or descendants: *Warnecke v. Lemba*, 71 Ill. 91, 12 Am. Rep. 85. To give to these words their ordinary meaning would seem to imply that upon the death of an entryman his executor or administrator, by making the necessary proof, should receive a patent for the land; but as it is altogether improbable that Congress intended that the title should vest in such representative, even in trust, the phrase so used in the act under consideration evidently means an heir, next of kin, or descendant. The homestead act provides that, upon the death of an entryman before fully complying with the conditions imposed, the right to complete the performance and receive a patent goes to his widow, or, in case of her death, to his heirs or devisees: U. S. Rev. Stats.,

sec. 2291 (U. S. Comp. Stats. 1901, p. 1390). Congress having used the word "devisees" in that act, and omitted it from the one under consideration, evidently discloses a purpose to prefer the heirs designated by the laws of a state, to the exclusion of devisees in the timber culture act. This substitution, in our opinion, makes the legal heirs of an entryman who dies before fully performing the conditions of the timber culture act donees of the United States, who take by purchase, and not by descent: *Cutting v. Cutting* (C. C.), 6 Fed. 259.

Our attention has been called to decisions made by the Department of the Interior that would seem to lead to a different conclusion, but, as such decisions are not conclusive ⁷⁷ in the determination of questions of law, we think the better reason supports the opposite view, and therefore such decisions will not be followed.

The plaintiff's counsel cite in support of their theory the case of *Church v. Adams*, 37 Or. 355, 61 Pac. 639, in which it was held that a claimant under the timber culture act, who had made an entry in good faith, was not inhibited from contracting, before final proof, to sell his claim. The decision in that case is based on the theory that the language of the act does not prohibit the making of such an agreement. If he performed the conditions which the law prescribed, and secured a patent for the land selected, a court of equity might enforce specific performance of his contract; but as his interest in the premises is extinguished by his death before full performance, the government, in effect, re-enters, but thereafter permits his heirs, if they so desire, to initiate a new right independent of their ancestor, thus donating to them his improvements, and also commuting the time by deducting the period in which the entryman was lawfully in possession of the premises. In our opinion, there is nothing in the case relied upon that in any manner contravenes the principle here announced. Believing, as we do, that Eaton had no devisable "interest" in the land, it follows that the decree is reversed and the suit dismissed.

The Owner of a Timber Claim upon public land has no devisable interest therein before a patent issues: *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163. But see *Phillips v. Carter*, 135 Cal. 604, 87 Am. St. Rep. 152; *Butterfield Lumber Co. v. Hartman*, 82 Miss. 494, 100 Am. St. Rep. 644, and cases cited in the cross-reference note thereto. If a homestead claimant upon public lands dies before patent issues, or before the right to demand a patent accrues, the land does not become a part of his estate, nor subject to ad-

ministration. Upon his death, all of his rights under the homestead entry cease, and his heirs become entitled to a patent, not as successors to his equitable interests, but because the law gives them a preference as homesteaders, and allows them the benefit of the residence of their ancestor upon the land.

MEYER v. LIVESLEY.

[45 Or. 487, 78 Pac. 670.]

LANDLORD AND TENANT—Assignability of Lease on the Shares.—A lease of land on the shares, including the use of buildings, farm implements, stock, and other personal property, is a personal contract not assignable without the consent of the lessor, because the amount to be received by him and the care of the property depend on the character, industry, and skill of the lessee. (pp. 668, 669.)

William M. Kaiser, Woodson T. Slater and Wirt Minor, for the appellants.

John H. McNary and Oscar Hayter, for the respondent.

⁴⁸⁷ BEAN, J. This is a suit to restrain the defendants from trespassing upon or interfering with the plaintiff's possession of a hopyard. On March 7, 1900, I. M. Simpson, being the owner of a certain tract of land in Polk county, upon which the hopyard in question was situated, leased the yard, with the improvements thereon, consisting of dry kilns, hop poles, etc., to the defendants, for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard, together with the hop kilns, baler and farming implements mentioned in the lease from Simpson to them to W. D. Huston, agreeing to furnish Huston one of the dwelling-houses on the Simpson place, or to remodel another building thereon, and the use of Simpson's horses ⁴⁸⁸ in the cultivation of the hops at a certain stipulated rate per day, in consideration of which Huston agreed to pay them, as rental, one-fourth of the "average quality" of the hops produced on the land during the years of 1903 and 1904. On January 11, 1904, Huston assigned to the plaintiff all his right and interest in and to the lease or contract between himself and the defendants. This assignment was not recorded, and on January 23, 1904, the defendants, without knowledge or notice thereof, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to be grown

during that year to secure a balance due for advances made the previous year. It was stipulated in the new lease that, in case of a violation of any of its terms by Huston, the defendants should have the right to re-enter and take possession of the hopyard, to complete the cultivation of the crop, and harvest and sell it, paying over the surplus, if any, to Huston. In March, 1904, the defendants attempted to enter and take possession of the hopyard, on account of a violation of the provisions of the lease or agreement between them and Huston, when this suit was brought by the plaintiff to enjoin them from doing so.

The only question we deem it necessary to consider is whether the lease from the defendants to Huston, made in October, 1902, was assignable by Huston without the consent of the defendants. The plaintiff claims title under such an assignment, but, unless Huston had authority to assign the lease to him, he has no standing in court, and the other questions become immaterial.

As a general rule, the power of assignment is incident to the estate of a lessee of real property, unless it is restrained by the terms of the lease: Wood on Landlord and Tenant, p. 529; Taylor on Landlord and Tenant, 9th ed., sec. 402. But a lease of land upon shares, including the use of buildings, farm implements, stock and other personal property, is regarded ⁴⁸⁹ as a personal contract, and not assignable without the consent of the lessor, because the amount to be received by the lessor, and the care of the property depend upon the character, industry and skill of the lessee: Taylor on Landlord and Tenant, 9th ed., secs. 24, 24a; Randall v. Chubb, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429; Lewis v. Sheldon, 103 Mich. 102, 61 N. W. 269. Randall v. Chubb is much in point. Chubb leased certain premises to Stoddard upon shares for the term of three years, with the privilege of five. Stoddard was to do all the work, find all the seed, and deliver to the lessor one-third of the crop. The farm was to be cropped in a certain specified way, and, as in the case at bar, the lessee was to have the use of certain property belonging to the lessor. The court held that the lease was not assignable, and that an attempt to assign it worked a forfeiture of the estate of the lessee, and the lessor could take immediate steps to recover possession. "The very nature and character of the lease or agreement," says Mr. Chief Justice Marston, "shows that it was a personal one to the defendant, and could not be assigned by him to a third party without the consent of his lessor. The rent or share which the latter would receive must depend very much upon the character of the lessee, and the lat-

ter could not place a party in possession of the premises who might not be a good husbandman, and who might not be able to carry on the farm operations in a good, careful and proper manner. Under such a lease the landlord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession upon any terms. So, with reference to the use of his farm implements, one might be a careful, prudent man, who would take good care of them, while another, more reckless, would not by the owner be permitted to use them upon ⁴⁹⁰ any terms." The same principle was reaffirmed in *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269.

The cases of *Dworak v. Graves*, 16 Neb. 706, 21 N. W. 440, and *Yates v. Kinney*, 19 Neb. 275, 27 N. W. 132, are not in fact in conflict with this doctrine. They involve the right of a lessee of property on shares to sell or mortgage his interest in the crop after it has been grown without the consent of the lessor, and not the right to assign or transfer all his estate or interest under the lease to another before the crop is raised. The terms of the lease from the defendants to Huston bring it directly within the doctrine of the Michigan cases. The lease included not only the hopyard, the successful cultivation of which necessarily depended upon the industry and skill of the lessee, but also the use of certain buildings, farm implements, and personal property, the care of which likewise depended upon the character of the lessee. In addition to this, the lease is indefinite as to its terms. It does not contain any stipulation as to the manner in which the hops shall be cultivated, cared for, harvested, or prepared for the market—provisions usual in leases of real property. Its nature and terms would seem to indicate that it was made by the defendants in reliance upon the ability, character, and skill of Huston. From the character of the agreement and the subject matter thereof, we are led to conclude that it was a personal contract, which Huston could not assign or transfer so as to substitute another in his place as lessee without the consent of the defendants.

These views result in the reversal of the decree and the dismissal of the bill, and it is so ordered.

Reversed.

The Assignment of Leases is discussed generally in the monographic note to *Washington Nat. Gas Co. v. Johnson*, 10 Am. St. Rep. 557-565. In *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, it is held that a lease of land to be worked on shares with the lessor's implements is not assignable.

MACBETH v. BANFIELD.

[45 Or. 553, 78 Pac. 693.]

CORPORATIONS—Stock Subscriptions, Suits in Equity to Enforce.—A creditor of a corporation may maintain a suit in equity to recover against stockholders of an insolvent corporation an unpaid balance of a stock subscription. (p. 675.)

CORPORATION—Stock Subscription, Payment of in Property.—The directors of a corporation may receive property in payment for stock in any case in which they are authorized under the charter or articles of incorporation to purchase for the benefit of the corporation and to subserve the purposes for which it was organized. (p. 676.)

CORPORATIONS—Stock Subscription, Payment of in Property, What Must be the Value of.—If a liability for a stock subscription is to be discharged in property, it must measure up to the money value. In other words, the value of the property must be equivalent to the amount of the subscription. (pp. 676, 677.)

CORPORATION—Stock Subscription, Payment in Property, When Deemed Fraudulent as to Creditors.—The payment of a stock subscription in property cannot be sustained merely on the ground that the directors acted in good faith or were not guilty of actual fraud. If property whose value is well known, or can easily be learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith and is made for a fraudulent purpose. This presumption becomes conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that a fraudulent intent appears on its face and is not explained, the court will hold it to be fraudulent as a matter of law. (pp. 678, 679.)

CORPORATION—Stock Subscription, Payment in Property, Fraud in, When Must be Affirmatively Proved.—If the nature of the property and the extent of the valuation are such that the excess valuation may have possibly been due to error in honest conviction or judgment, then, to render the transaction invalid, actual fraud must be shown. The real question in cases of this character is whether the property was taken at a high valuation with the fraudulent intent of evading the plain mandate of the law. (pp. 679, 680.)

CORPORATION—Stock Subscription, Payment in Property at an Overvaluation, Remedy for.—When stock is issued for property taken at an overvaluation, it is competent to compel the stockholders to respond for the difference between the actual value of such property and the par value of the stock. (p. 680.)

CORPORATION—Stock Subscription, Payment in Property, Creditors, When Entitled to Relief Against.—If a stock in a creamery corporation is issued as fully paid up for a sum double the value of the property transferred to such corporation by its stockholders, and double the value which they had placed upon it in transactions between themselves prior to the formation of the corporation, the act of the directors in issuing it must be deemed fraudulent as to creditors, and they may in equity compel the stockholders to pay in as upon their subscription the difference between the value of the property received by the corporation and the par value of the stock. (p. 680.)

William Torbert Muir, for the appellant.

George William Pyle Joseph, for the respondent.

⁵⁵⁴ WOLVERTON, J. This is a suit by William Macbeth, trustee of the Kaupisch Creamery Company, a corporation, bankrupt, against M. C. Banfield and others. Prior to January 27, 1899, Julius C. Kaupisch and H. W. Kaupisch were engaged in the creamery business under the firm name of the Kaupisch Creamery. On that date they transferred and set over to M. C. Banfield and Thomas Rand an undivided one-half interest in the business, for the stipulated consideration of \$5,000. One thousand dollars of this amount was at once applied on invoices for butter previously shipped to the firm from the east. On the following day a corporation was organized as the Kaupisch Creamery Company, with a capital stock of \$30,000, divided into twelve hundred shares, at \$25 each, to which corporation the Kaupisch Creamery, the partnership concern, transferred by bill of sale all of its plant, stock, machinery, goodwill, etc., for the designated sum of \$16,000,⁵⁵⁵ and also paid into its treasury \$4,000 in cash, all in consideration that the board of directors of the Kaupisch Creamery Company should issue eight hundred shares of its capital stock, fully paid up, as follows: To Julius C. Kaupisch, four shares; H. W. Kaupisch, one hundred and ninety-six shares; H. M. Kaupisch, four shares; M. M. Kaupisch, one hundred and ninety-six shares; M. C. Banfield, two hundred shares; and Thomas Rand, two hundred shares—who were subscribers therefor. This was agreed to by unanimous vote of the board, and the stock was subsequently issued accordingly, and accepted by the parties named, thus closing the transaction. But two additional shares were subscribed for, which were fully paid up. The corporation, after engaging in business for six months or thereabouts, became insolvent; and the plaintiff was appointed trustee in bankruptcy, and now brings this suit for the benefit of the creditors, to require the above stockholders to respond for any balance of their stock that might be deemed unpaid, to the amount of the unpaid indebtedness of the concern. The plaintiff prevailed in the trial court, and this appeal is by Banfield alone.

⁵⁵⁸ The gist of the controversy is that as to the creditors the stock was fraudulently issued as fully paid up, when in reality less than half of its par value has been so paid.

The conclusions of fact are not difficult of ascertainment. The Kaupisch Creamery owned certain property and merchandise which it had acquired in the course of five months' engagement in the creamery business; and, it being desirous of enlarging its business and placing its management in the hands of a corporation, Banfield and Rand purchased a half interest therein, so that nominally, and for the time being, they became partners with ⁵⁵⁹ the Kaupisches. For the purpose of ascertaining the value of the property of the partnership, an inventory was taken, which showed a valuation of \$4,700. It was then agreed between all the parties concerned, with the view of making Banfield and Rand equal in the investment with the Kaupisches, that they should contribute or pay into the concern the sum of \$5,000, which they did. That \$1,000 was used by the Kaupisches to pay certain indebtedness of the company for butter consignments from the east can have no special bearing in the case. It does not lessen the amount of Banfield and Rand's contribution to the business, which was designed to make them equal with the Kaupisches; the contribution of the Kaupisches being the property formerly belonging to the Kaupisch Creamery, under which name they were engaged as partners. A bill of sale was given at the time by the Kaupisch Creamery and the Kaupisches to Banfield and Rand, describing the property set over as "an undivided one-half interest in and to all of the plant, stock, book accounts, and goodwill of said business." There appears to have been no stipulation that it should be free from encumbrance, or that the concern was free from debt, but only that it was agreed that the Kaupisches, as partners, should, for the consideration of \$5,000 to be paid into the concern, sell and transfer to Banfield and Rand an undivided half interest in the business; the effect being that Banfield and Rand were taken into the company as equal partners with the Kaupisches, the company still being obligated to pay the indebtedness of the concern. This seems to us to have been the exact status of the parties after the sale of the one-half interest in the business of the Kaupisch Creamery to Banfield and Rand, and prior to the completion of the organization of the Kaupisch Creamery Company, and the transfer to it of the property of the Kaupisch Creamery. On the completion of the organization, ⁵⁶⁰ all of the property described as "all of the plant, stock, machinery, and goodwill of the said business," was transferred to the corporation by bill of sale regularly executed by the Kaupisch Creamery, the Kaupisches, and Ban-

field and Rand. The consideration named as the inducement for this transfer is \$16,000, besides which the Kaupisch Creamery paid over and turned into the treasury of the Kaupisch Creamery Company the sum of \$4,000. These sums, aggregating \$20,000, constituted the consideration for the issuance of eight hundred paid-up shares of the capital stock of the corporation to the several parties named in the statement above, they having formerly subscribed for the same. Thus the corporation became invested with the property of the Kaupisch Creamery, and thus it is that the stockholders named acquired their stock, so that the transactions clearly indicate what the exact consideration was which the subscribers paid for their stock.

It will be noted that the bill of sale by the Kaupisch Creamery to Banfield and Rand describes the property designated for transfer in precisely the same language as the bill of sale to the corporation, with the exception that the words "book accounts" are included in the former; both containing the words "goodwill of said business." Evidently, therefore, that particular species of property was in the minds of the parties while agreeing upon and consummating both transactions, and was especially made the subject of transfer in each case. In the former, the goodwill, together with the other property of the Kaupisch Creamery, was considered the equivalent of \$5,000 in value, and nothing more, for that sum is what Banfield and Rand paid into the concern in order that they might become one-half owners in the whole. There was some indebtedness of the concern, but this, from the result of the transaction, was to be shared by all the parties, and was in fact paid out of the business, so that here we have ⁵⁶¹ the estimate of the parties concerned as to the value of the goodwill. When, however, these parties transferred the identical property to the corporation, which was practically organized by themselves, they fixed a valuation of \$16,000 as its worth to the company; exceeding by more than three times the value placed upon it in the first transfer, although the two transfers were made in point of time with but a single day intervening. Further then this, the Kaupisch subscribers to the capital stock and Banfield and Rand on January 27th, the day of the transfer of one-half interest in the property of the Kaupisch Creamery to Banfield and Rand, entered into a written agreement whereby the Kaupisches, on the one part, agreed to take four hundred shares of the capital stock of the Kaupisch Creamery Company, and to pay therefor

\$2,000 in cash, and the remainder, or \$8,000, in the plant, stock and goodwill of the creamery business, and Banfield and Rand, on the other part, agreed to take a like number of shares, and to pay therefor in like manner as the Kaupisches were to pay for their stock; and it was further agreed between the parties so designated and subscribing that they should not sell to any outside party, and that, in case either of them desired to sell, the other should have the option to purchase, at \$12.50 per share; stipulating as liquidated damages in case of a breach of the condition the rate of \$12.50 per share for each and every share so otherwise sold. Banfield and J. C. Kaupisch, testifying in the case, however, gave it as their honest conviction that the plant, stock, and goodwill of the partnership were fully worth the valuation placed upon them by this agreement, namely, \$16,000, and that the board of directors received them, together with the \$4,000 cash, in entire good faith in payment for said stock. But speaking further of this last-mentioned agreement, and in explanation ⁵⁶² of its purpose, Kaupisch says: "Well, if one wanted to drop out, we only paid \$5,000. That was just among ourselves. If he had \$10,000 worth of stock, and only paid \$5,000 for it, then maybe he could force the other to ask \$10,000 for it." Further on the following inquiries were made, and answers elicited: "Q. You paid in \$4,000 into the corporation? A. Five thousand dollars. I believe the books show the corporation got the benefit of \$4,000 in cash. . . . Q. You were paying for \$10,000 worth of stock with \$5,000? A. That was the proposition. Q. You paid \$12.50 a share for your stock, was it not? You paid just half? A. Yes, sir; that would be \$12.50. Q. But if anybody else came in afterward and subscribed for stock, you were going to charge them \$25 a share? A. That was the idea."

This theory of the transaction is borne out by Dey, who was desirous at one time of procuring some of the stock, but refused to purchase because he could not obtain it on the same basis at which the parties had procured theirs, namely, at the rate of fifty per cent of the par value. There is scarcely a doubt, therefore, that these parties procured their stock at not to exceed fifty per cent valuation, and that they so understood it, although they speak in the record to the contrary, by giving it as their opinion that the property and goodwill of the partnership were of the actual value they placed thereon in making the transfer to the Kaupisch Creamery Company. To conform to their estimate, the goodwill of the concern must have been of

enormous value, namely, the difference, at least, between the sum of \$4,700 and \$16,000, or \$13,300. The Kaupisch Creamery had been running but five months, starting with an investment of \$2,000. True, the profits ⁵⁶³ during that time were estimated at \$2,300 and the business was extensive; but, with all this, it is impossible that the goodwill should be worth several times the capital invested. It is argued that the inventory was made on the basis of the cost price, and it is pointed out that one machine was valued at \$150, its cost price, whereas its real value was \$2,000. This is the only article specifically mentioned upon which stress is laid, but the claim for it is seriously controverted by the evidence, and, upon the whole, it is manifest that the contention lacks support. The inventory was probably made as other inventories usually are where there is to be a sale or transfer of the property involved for the purpose of arriving at substantial values, so that a basis may be had for intelligent dealing with reference to it. It is plain, therefore, that either by design or through bad judgment there was the grossest kind of overvaluation of this property to be taken in payment for the stock to be issued by the corporation to these subscribers, and that they did not really pay to exceed fifty per cent of the par value therefor. Such being the conclusion as to the fact, we are now to inquire as to the law applicable in the premises.

1. The appellant's contention is that the corporation, through its board of directors, exercised its best judgment as to values, and acted in entire good faith in accepting the property, including the goodwill of the partnership concern, in full payment of the capital stock issued, and therefore the transaction is unimpeachable at the suit of creditors; in other words, the stockholders must be held to be exonerated from all liability to the corporation for the benefit of the creditors, except in case of actual fraud charged against the corporation and stockholders, and affirmatively proven. That a suit in equity is maintainable by a creditor, or one standing in his stead, to recover against the stockholder of an insolvent corporation an ⁵⁶⁴ unpaid balance of his stock subscription, must be deemed to be settled law in this state, the liability being not to the creditor, but for the indebtedness to the corporation, which is treated as an asset, and to which the creditor is entitled in the adjustment of legal demands against the corporation: *Ladd v. Cartwright*, 7 Or. 329; *Falco v. Kaupisch Creamery Co.*, 42 Or. 422, 70 Pac. 286; *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. Rep. 432,

27 L. ed. 265. By the mandate of our constitution, stockholders are made liable for the indebtedness of the corporation to the amount of their stock subscribed and unpaid: Or. Const., art. 11, sec. 3. In pursuance of this clause, it was early enacted that "all sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person for whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock; but, if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser": Bellinger & Cotton's Compilation, sec. 5065. There is an amendment to this statute, but it came at a time subsequent to the transactions upon which the present suit is founded: Laws 1903, p. 212.

2. These enactments, both fundamental and legislative, indicate quite clearly the policy of the lawgiver touching the payment of stock by a subscriber. His liability is to the full amount of the capital stock subscribed. The directors of a corporation, in the absence of a constitutional or statutory inhibition to the contrary, may receive property in payment for stock in any case in which they are authorized under the charter or articles of incorporation to purchase for the benefit of the corporation, and to subserve the purposes for which it is organized: Clark on Corporations, 379. Of course, ordinarily, where there has been no agreement with the directors that the subscriber for ~~565~~ stock might pay for it in property, the obligation is to pay in money and when so payable there can be no possible cavil as to the amount that would be required to meet his liability. It must be the equivalent of the par value of his stock. Money is admittedly the standard of all values, and it is a natural sequence that, if stock liability is to be discharged in property, the property should measure up to a money value. Such is, no doubt, the plain intendment of the law; otherwise it might easily be so managed that stock subscribers would be virtually exonerated from their statutory liability by pretended and simulated agreements with the directors, and the corporation left without assets of material moment from the beginning, which would atrociously belie the representations made by the articles of incorporation touching the capital stock. Such is not the spirit of the law, nor has it been so where there were no statutory regulations upon the subject; the common declaration being that the stock must be paid in money or money's worth—that is, what may fairly and justly be considered as money's

worth: *Wetherbee v. Baker*, 35 N. J. Eq. 501, 513; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, 598; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476, 35 L. ed. 104; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. Rep. 585, 36 L. ed. 363; *Elyton Land Co. v. Birmingham W. & E. Co.*, 92 Ala. 407, 423, 25 Am. St. Rep. 65, 9 South. 129, 12 L. R. A. 307.

3. We deem it important in this connection to state the basis of the stockholders' liabilities for the benefit of the creditors of the corporation, in view of the theory advanced that a subscription to the capital stock of the corporation is a mere contract of purchase, in which there is no element of trust; that the corporation, on the one hand, and the subscriber, on the other are the parties to the contract—one to deliver stock, and the other to pay therefor; that the board of directors may determine how and in what ⁵⁶⁶ manner stock payments may be made; and that if the parties concerned, acting bona fide, mutually agree upon the terms of the contract, including the manner in which stock obligations shall be discharged, the transaction should be held valid, except for fraud, or a course of dealing tantamount thereto, the same as if the contract were made between parties sui juris. There is a familiar doctrine, commonly called the "American doctrine," that the capital of the corporation constitutes a trust fund for the benefit of the creditors, which is said to rest upon the equitable consideration that the distribution of the capital stock among stockholders without making adequate provision for the payment of debts, or the issuance of fictitious paid-up stock, is a fraud upon creditors contracting with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full: *First Nat. Bank v. Gustin Min. Co.*, 42 Minn. 327, 332, 18 Am. St. Rep. 510, 44 N. W. 198, 16 L. R. A. 676. The doctrine, taken in its fullest signification, is severely criticised as in itself inadequate, and as affording an erroneous basis upon which to found the creditor's remedy. His right of recourse to obligations for unpaid stock is no more sacred or operative than his right to any other asset of an insolvent corporation. The corporation may undoubtedly dispose of its assets as it may see fit while a going concern, its charter permitting; and, if in the meantime it has fairly disposed of stock subscriptions (that is to say collected the just demands arising therefrom, and in good faith disposed of the proceeds), there can arise no trust with reference to it, any more

than there could for any other asset that has passed through and out of its hands. It is only when the unpaid capital becomes an asset of an insolvent concern that it is impressed with a trust in favor of creditors. And so it is with an individual or any ordinary partnership. All assets ⁵⁶⁷ in their insolvency become trust funds for the benefit of creditors.

Perhaps a more reasonable and substantial ground for the liability is that promulgated by Mr. Justice Mitchell in *Hospes v. Northwestern M. & C. Co.*, 48 Minn. 174, 197, 31 Am. St. Rep. 637, 50 N. W. 1117, 1121, 15 L. R. A. 470. He says: "By putting it [the liability] upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation, and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus' stock"—or, we may add here, stock the payment of which, either in full or in part, has been merely simulated, and not in reality made as contemplated by the relationship under the law.

⁵⁶⁸ 4. Now, to recur to the initial contention: It is, no doubt, the doctrine of some of the cases that, where the directors have acted in good faith and according to their best judgment in fixing and agreeing with the shareholders as to the value of the property to be taken and accepted in payment of stock subscriptions, their acts in the premises are unimpeachable, and can only be annulled or set aside for actual—that is to say, inten-

tional or active—fraud, which must be affirmatively shown. But there are other cases holding to what we deem to be the sounder view, being the better calculated to inculcate fair dealing and meet the ends of right and justice. We quote from *Coleman v. Howe*, 154 Ill. 458, 469, 45 Am. St. Rep. 133, 39 N. E. 725, 727, in exemplification: "Where property, whose value is well known or can be easily learned is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive, unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law." So, in *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302, 307, 26 N. E. 538, 539, the court, speaking through Mr. Justice Vann, say: "The fraud is consummated by the issue of stock as full-paid stock which has not been fully paid, and it does not depend upon any fraudulent intent, other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value." The language of Mr. Justice Field is: "But where full-paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud": *Coit* ⁵⁶⁹ *v. North Carolina Gold etc. Co.*, 119 U. S. 343, 345, 7 Sup. Ct. Rep. 231, 233, 30 L. ed. 420. To a like purpose is *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630, although the syllabus would seem to limit the rule. See, also, *Young v. Erie Iron Co.*, 65 Mich. 111, 123, 31 N. W. 814. Fraud in law is therefore as effective to impeach the transaction in favor of creditors as fraud in fact; the difference being that in the one case the law raises the intent from the nature of the transactions, while in the other it must appear by affirmative proof, and, the intent being presumed, it must be rebutted, or the law will declare the act fraudulent. One is as vicious in circumventing right and justice as the other.

5. If, however, the nature of the property and the extent of the overvaluation are such that the excess valuation may have possibly been due to error in honest conviction or judgment, then, to render the transaction invalid, actual fraud must be shown, and it is one of fact, the real question in cases of this character being whether the property was placed and taken at

a high valuation with a fraudulent intent of evading the plain mandate of the law. It is competent for the determination of the question to take into consideration the nature of the property, the purposes for which it is accepted, and all the conditions and circumstances attending and surrounding the transaction; and if, from the whole, it appears that the board has acted in good faith, in the honest exercise of its best judgment, no adverse presumption impending, then are its acts conclusive, otherwise not: *Clark on Corporations*, 380, 381; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, 598; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Elyton Land Co. v. Birmingham W. & E. Co.*, 92 Ala. 407, 423, 25 Am. St. Rep. 65, 9 South. 129, 12 L. R. A. 307; *Osgood v. King*, 42 Iowa, 478; *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449, 20 N. W. 764.

⁵⁷⁰ 6. When stock is issued for property taken at an overvaluation, it is competent to compel the stockholder to respond for the difference between the actual value of such property and the par value of the stock: *Coleman v. Howe*, 154 Ill. 458, 469, 45 Am. St. Rep. 133, 39 N. E. 725, 727; *Jackson v. Traer*, 64 Iowa, 469, 52 Am. Rep. 449, 20 N. W. 764. In this view of the law, there is but one conclusion to be reached. There was an exaggerated and gross overvaluation of the property, and the presumption of bad faith thereby engendered has not been satisfactorily explained away or rebutted. But when the fact is considered in connection with all the other facts disclosed by the testimony, we are convinced that there was a scheme having in contemplation from the beginning the issuance of this stock as fully paid up, for a consideration not to exceed one-half of its par value, and that actual fraud has been shown. We find, therefore, that the other half of the stock is unpaid, and in this particular alone will the findings of the trial court be modified. It does not change the result, however, and the decree of the trial court will be affirmed.

In this opinion we have considered the liability of a subscriber to the capital stock of a corporation—not one who comes by it by purchase or otherwise—to a creditor dealing with the company subsequent to the issuance of the stock without knowledge of the true basis upon which it was issued. Furthermore, we pass no opinion on the intendment of the amendment in 1903 of section 5065, *Bellinger & Cotton's Compilation*. It is not involved in this controversy, having been enacted subsequent to

the time when the rights and liabilities of the parties herein became fixed.

Affirmed.

Where Corporate Stock Subscriptions are made payable in property, it must be taken at a reasonable money value; and although a margin will be allowed for honest differences of opinion as to such value, deliberate and intentional overvaluation is not permissible. When overvaluation is grossly excessive and intentionally made, though without actual fraud, it is invalid as to corporation creditors, who may proceed against the stockholders individually as for unpaid stock subscriptions: *Elyton Land Co. v. Birmingham etc. Elevator Co.*, 92 Ala. 407, 25 Am. St. Rep. 65; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133; *Sprague v. National Bank*, 172 Ill. 149, 64 Am. St. Rep. 17; *Wishard v. Hansen*, 99 Iowa, 307, 61 Am. St. Rep. 238; monographic note to *Buck v. Ross*, 57 Am. St. Rep. 67, 68.

But if a creditor of an insolvent corporation did not extend credit on the faith that shareholders paid their subscriptions in money or money's worth, but, on the contrary, knew at the time of the creation of the corporate debt that the stock was paid for in simulated values, he cannot recover from a stockholder the difference between what he paid for his stock and its par value: *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 287.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

PROVIDENCE COUNTY SAVINGS BANK v. HUGHES.

[26 R. I. 73, 58 Atl. 254.]

PROBATE COURT—Jurisdiction to Appoint Guardian—Presumption.—If a petition for the appointment of a guardian states an unstatutory ground, a decree appointing him expressly on that ground is void and not aided by a presumption that the court acted within its jurisdiction. (p. 686.)

A PROBATE COURT is a Court of Limited Jurisdiction, in Rhode Island. (p. 686.)

PROBATE COURT—Presumption of Jurisdiction.—The presumptions which, under the Rhode Island statutes, attach to the judgments of probate courts, are, at most, only equal to those which attach to the judgments of superior courts. (p. 686.)

John A. Tillinghast, for the complainant.

Page, Page & Cushing and Thomas F. West, for the respondents.

74 TILLINGHAST, J. This is a bill of interpleader, and is brought for the purpose of having the court determine the conflicting claims of the respondents to the sum of three hundred and seventy-two dollars and sixty-nine cents, now in the registry of the court, said sum being the balance left after the foreclosure of the mortgage on certain real estate situated in the city of Central Falls and formerly owned by John Makin and Catherine Makin, and mortgaged by them to the complainant. The respondents are heirs at law of said John and Catherine Makin, and make adverse claims to said fund.

The only question presented for our decision in the case is whether or not John Makin, who inherited an interest in said real estate from his son Joseph Makin, who died intestate

June 21, 1890, was under guardianship at the time when he executed and delivered to the respondent Ann Hughes, on June 20, 1890, the deed of all his right, title and interest in and to said real estate, from the sale of which, under a prior mortgage to the complainant, the fund now in dispute arose. Said John Makin, the grantor in the deed to Ann Hughes, died intestate, February 9, 1893.

The facts relating to the guardianship are as follows: On November 24, 1888, the following petition was presented to the probate court of the town of Lincoln, viz.:

"The undersigned, John Makin, of said Lincoln, hereby requests that William H. Gooding of said Lincoln or some other suitable person, may be appointed guardian of his person and estate, he being a person of full age and incompetent of managing his estate.

his
"(Signed) JOHN X MAKIN."
mark.

75 The action of the court in the premises was as follows: "At the court of probate of the town of Lincoln on this twenty-ninth day of December, 1888. The petition of John Makin, of Lincoln, in writing requesting that William H. Gooding of said Lincoln, or some other suitable person may be appointed guardian of his person and estate, he being a person of full age and incompetent of managing his estate, which was presented to this court on the twenty-fourth day of November, A. D. 1888, and then referred to this time with an order of notice thereon, is now again taken up, and it appearing that notice has been duly given pursuant to said order, and no person appearing to object. Upon consideration thereof it is ordered, adjudged, and decreed that the request of said petitioner be granted and said William H. Gooding is hereby appointed guardian of the person and estate of said John Makin."

The letter of guardianship to Gooding recites the ground upon which he was appointed, which is the same as that stated in both the petition and decree aforesaid.

Counsel for the respondent Ann Hughes contend that the record above set out affirmatively shows a want of jurisdiction on the part of the probate court to appoint a guardian of John Makin, for the reason that the ground for said appointment alleged in the petition and incorporated in the decree is not one of the grounds enumerated in Public Statutes of Rhode Island, caption 168, section 7, in force at the time of said appointment,

and hence that the action of the probate court in the premises was a nullity.

The statute referred to reads as follows: "Whenever any idiot or lunatic, or person of unsound mind, or any person who from excessive drinking, gaming, idleness or debauchery of any kind, or from want of discretion in managing his estate, shall be likely to bring himself or family to want, or to render himself or family chargeable, shall reside or have a legal settlement in any town, the court of probate of such town shall have the right to appoint a guardian of the person and estate of such person, and of the estate, within this state, of such person resident without this state."

Under this statute it would seem to be clear that the jurisdiction of a probate court in the appointment of guardians ⁷⁶ is limited to those cases where the person sought to be put under guardianship is likely, for some one or more of the reasons therein named, to bring himself or family to want or to render himself or family chargeable. And this being so, it follows that no case was stated in the petition referred to which warranted the court in appointing a guardian. And as it appears that the decree which the court passed was expressly based upon the ground set out in the petition, it also follows that all that the court found in the premises was that the petitioner was incompetent of managing his estate. But as this was not sufficient to warrant the appointment of a guardian (*Pratt v. Court of Probate*, 22 R. I. 596, 48 Atl. 943; *Hopkins v. Howard*, 20 R. I. 394, 39 Atl. 519), the decree was a nullity. See, also, *Overseers of the Poor v. Gullifer*, 49 Me. 360, 77 Am. Dec. 265.

But counsel for the respondents Ann and Maria Makin contends that as under Public Statutes of Rhode Island, caption 181, section 5, the probate court had jurisdiction of the subject matter of the appointment of guardians, its action in the premises is conclusive and can only be revoked or repealed for cause, by some proceeding operating directly upon the record. The statute relied on reads as follows: "No order, judgment or decree of a court of probate or town council, which may be appealed from, or in any collateral proceeding when the same shall not have been appealed from, shall be deemed to be invalid, or be quashed for want of proper form, or for want of jurisdiction appearing upon the face of the papers, if the court or council had jurisdiction of the subject matter of such order, judgment or decree," etc.

In construing this statute in *Angell v. Angell*, 14 R. I. 541, which is the case mainly relied on by counsel for the respondents Ann and Maria Makin in support of the position taken by him, the court held that under it "a judgment of a probate court was to be upheld as *prima facie* valid even where the record did not show by allegations or recitals the existence of jurisdictional facts necessary to its validity." Durfee, C. J., in delivering the opinion of the court in that case, says (page 544): "We think it fair to assume that the purpose of the statute in this respect was to communicate to the judgments⁷⁷ and decrees of our probate courts and town councils the presumptions which attach to the judgments and decrees of courts of superior jurisdiction, in regard to which the common-law rule is that in collateral proceedings the jurisdiction will be presumed, if it can exist, unless the contrary appears": See, also, *Hunt v. Gorton*, 20 R. I. 163, 37 Atl. 706.

The law as thus stated is not only not in conflict with the view which we have taken of the case at bar, but clearly sustains the same. For, while the court of probate had jurisdiction to appoint a guardian for John Makin upon any of the grounds enumerated in the statute, it had no jurisdiction to appoint one on any other ground. And as the ground specified in the application and followed in the decree and also in the letter of guardianship was not a statutory one, it appears from the record that the court had no jurisdiction in the matter.

Suppose, by way of illustration, that the petition had set out that John Makin was unable to pay his debts and that he desired that a guardian of his person and estate might be appointed, and that the court had thereupon granted his petition and appointed such a guardian upon the express ground stated. Could it be reasonably contended that such a decree would be of any binding force? Take the following illustrations. Suppose the petition had alleged that John Makin was not a person of ordinary intelligence, or that he was imprudent in the management of his affairs, or that he was addicted to habits of intemperance, or that he was in the habit of gambling. Could anyone legally claim that the probate court would thereby have acquired jurisdiction to appoint a guardian over him on any of those grounds? Clearly not. For, in every such case the facts would appear which would show a want of jurisdiction, and hence the case would fall within the exception stated by Durfee, C. J., *supra*, viz.: "That in collateral proceedings the jurisdiction will be presumed, if it can exist, unless the contrary ap-

pears." And in each of the cases supposed the contrary does appear, as it also does in the case before us.

If the petition had been silent as to the ground upon which ⁷⁸ a guardian was asked for, it would be aided by presumptions. And even if it had not been silent, but had stated a ground which was not a statutory one, as was true in the Angell case, yet if the decree were not expressly based upon the unstatutory ground, but were a decree for the appointment of a guardian simply, it would also be aided by the presumption that the court had acted within its jurisdiction. But, as said by Mr. Black in his valuable work on Judgments, volume 1, second edition, section 277: "If it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete. Where the existence of any jurisdictional fact is not affirmed upon the record in a court of superior jurisdiction, it will be presumed upon a collateral attack that the court acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. But no presumptions in support of a judgment are allowed in opposition to any statement made in the record": See, also, 1 Black on Judgments, 2d ed., sec. 278; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, and People's Saving Bank v. Wilcox 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211. And if no such presumptions obtain in support of a judgment of a court of superior jurisdiction, they certainly cannot be held to obtain in support of a judgment of a court of limited jurisdiction, which a court of probate in this state is: People's Sav. Bank v. Wilcox, 15 R. I. 258, 2 Am. St. Rep. 894, 3 Atl. 211. And, at most, under the ruling of this court in Angell v. Angell, 14 R. I. 541, the presumptions which under the statute attach to the judgments of probate courts are only equal to those which attach to the judgments of superior courts.

In what we have hereinbefore said relative to the question of jurisdiction in the probate court we do not overlook the fact, already suggested, that in Angell v. Angell, 14 R. I. 541, the ground upon which the petition for the appointment of a guardian was based was not a statutory one, as expressly held by the court. But, nevertheless, in that case, for aught that appears, the probate court might have found that a statutory ground did exist. And in the absence of anything appearing on the record to the contrary (the decree which we find in the papers not specifying the ground upon which ⁷⁹ it was granted), it is to

be presumed that the probate court did so find, and that this is the reason why its action was upheld.

In this connection we may observe that two guardians of Vashti W. Angell had been previously appointed by the same probate court, as the papers show (see, also, *Angell v. Court of Probate*, 11 R. I. 187), the first one having been appointed on the ground that she was a person who was intemperate, and from want of discretion in the management of her estate was likely to bring herself to want and to render herself chargeable to the town; that upon the resignation of said first guardian a second one was appointed as his successor who subsequently died, and that the application for the appointment of a guardian in place of the one who had died was embodied in the petition which was before this court when said opinion was rendered.

In view of these facts it is certainly fair to presume that the appointment last made was based upon a statutory ground.

Indeed, Chief Justice Durfee says, on page 545 (14 R. I.) of the opinion: "The probability is that the appellant was appointed as successor to the second, and on the ground on which the second had been appointed."

For the reasons above given we are of the opinion that John Makin was not under guardianship at the time of giving the deed in question, and hence that it was effectual to convey to the grantee, Ann Hughes, all his right, title and interest in and to the property described therein.

The Power to Appoint a Guardian for an incompetent depends on the statute, and cannot be exercised unless the conditions prescribed by the statute exist: *In re Streiff*, 119 Wis. 566, 100 Am. St. Rep. 903. If proceedings for the appointment show upon their face that the court acted without jurisdiction, the order making the appointment is subject to collateral attack: *McGee v. Hayes*, 127 Cal. 336, 78 Am. St. Rep. 57.

Legal Presumptions do not come to the aid of a record, except as to acts or facts as to which the record is silent. Where the record is silent as to what was done, it will be presumed that what should have been done was done and done rightly; but when the record states what was done, it will not be presumed that something different was done: *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

WALDRON, PETITIONER.

[26 B. I. 84, 58 Atl. 453.]

WILLS.—A Burial Lot, in which the previous wives and a child of the testator are interred, does not pass under a general residuary devise to his widow, as against his children. (pp. 689, 690.)

Andrew B. Patton and Nathan B. Lewis, for the parties.

⁸⁴ **STINESS, C. J.** Horatio L. Waldron was the owner of a burial lot in Swan Point Cemetery. He died in 1901, leaving a will, in which Emeline A. Waldron, his widow, was his residuary legatee. The will made no mention of the burial lot, and the question is whether it passed to the widow under the residuary clause, or to his daughter as his heir at law.

"The Proprietors of the Swan Point Cemetery" is a corporation for the purpose of maintaining the cemetery grounds, which held title to the land in fee simple. It conveyed a lot, by deed, to Horatio L. Waldron, his heirs and assigns, limiting the use to sepulture of the dead, and to the rules of the corporation.

⁸⁵ Two previous wives and a child of Mr. Waldron were buried in the lot before his death.

Similar conditions existed in *Gardner v. Swan Point*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871, where a widow claimed title to a burial lot as residuary legatee. The court said: "In the cases of churchyards and cemeteries, it has been held that, though a deed may run to a grantee, his heirs and assigns, he takes only an easement or right of burial, rather than an absolute title"; citing cases. "So long as the land is used for burial purposes he cannot exercise the same rights of ownership as in other real estate."

The court did not decide the question of title in that case. The question was not one of title to the lot, but a right to change the place of a body already buried, as between a widow and the next of kin of the testator, to whom she had conveyed the lot. Cases bearing upon title were cited to show how the right of control of the body would devolve, as a general rule.

A question of title came before this court in *Derby v. Derby*, 4 R. I. 414. In that case the executor was empowered to sell all the real estate to pay pecuniary and residuary legacies, and the question arose whether he should sell a burial lot in a cemetery, where the testator's first wife was buried. The court said: "This lot was purchased by the testator for a burial place

for his family. That he should deliberately intend that it should be sold and go into the hands of strangers, it is difficult to believe, without the most express direction. It is the more difficult in this case, as within it are deposited the remains of his former wife; and could he intend that those remains should be disturbed?

"He had devoted this lot to pious and charitable uses, as a place of burial for the members of his own family. Did he mean to revoke it? It could not have been in the contemplation of the testator that this lot should be sold out of his family, nor could he have contemplated it as property in any such sense as to fall within the power given to the executor; and without an express direction to sell this particular lot, we think we shall not be warranted in advising the executor to sell it."

These remarks apply with equal force to the case at bar. ⁸⁶ Although this devise was to his widow, yet, as there were no children of her marriage, the lot, if devised, would go out of his family to her heirs. His living daughter would have no right to be buried in the family lot. It seems improbable that he should have intended such a result, or that he meant to devise to his widow and her heirs a lot which contained the remains of his two previous wives and his children.

It is also improbable that one has in mind a burial lot in a residuary devise. Men are not likely to inventory it among their assets or to regard it as property to be passed by a will. It is essentially a family heritage.

It has been held, on grounds of public policy, that a burial lot, where bodies have been buried, cannot be mortgaged for debts: *Thompson v. Hickey*, 59 How. Pr. (N. Y.) 434; and that a deed of it carries only a right to use it for burial purposes: *Buffalo Cemetery v. City of Buffalo*, 46 N. Y. 503. The charter of the cemetery provides that the land shall not be taxed, and a recent amendment to the charter also provides that it shall not pass by will except to the corporation.

While we do not mean to say that a burial lot is not property, yet all of these limitations tend to show that it has been shorn of so many of the ordinary attributes of property as to raise the presumption that it is not intended to be passed under a general devise in which it is not specially mentioned. A strong reason for this is found in the right to the control of the corpse, as between a widow and next of kin, as shown in *Pierce v. Swan Point*, 10 R. I. 227, 14 Am. Rep. 667, and *Hackett v. Hackett*,

18 R. I. 155, 49 Am. St. Rep. 762, 26 Atl. 42, 19 L. R. A. 558. The right of custody of the remains and the right of property in the burial lot should go together, where it is possible.

Following the doctrine of *Derby v. Derby*, 4 R. I. 414, and the implied approval of it in *Gardner v. Swan Point*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871, a burial lot does not pass under a general residuary devise, but it descends to the heirs as intestate property. It is a family burial lot. It is that fact alone which gives a peculiar limitation to its tenure. The heir takes it subject to all the conditions for which the ancestor held it. A sort of trust attaches to the land for the benefit of the family. Neither ⁸⁷ the widow nor the child can be excluded from it for want of title, yet such a result might follow if the tenure was like that of other real estate. Children could exclude a widow or a widow could exclude children by virtue of ownership of the land.

The view, therefore, taken in *Derby v. Derby*, 4 R. I. 414, was founded in sound reason and policy, and it has been regarded as the law in this state for a long time. It did not quite touch the point involved here, because the question was whether the lot should be sold to pay debts or legacies.

Still we do not hesitate to follow its doctrine, and accordingly our opinion is that the burial lot did not pass by the residuary clause of the will of Horatio L. Waldron, but descended to his daughter, Hattie L. Peirce.

While a Burial Lot is regarded as property, the title to which in most cases descends to the heirs, the tenure is generally unlike that of ordinary real estate: *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897. The purchaser of a lot in a public cemetery for burial purposes seems not to acquire the fee, but only an easement or license of burial therein: *Stewart v. Garrett*, 119 Ga. 386, 100 Am. St. Rep. 179.

DAVIS v. SMITH.

[26 R. I. 129, 58 Atl. 630.]

LANDLORD'S LIABILITY to Tenant's Family for Failure to Repair.—A landlord who has agreed with his tenant to make repairs is not liable in tort to a member of the tenant's family who receives personal injuries from the landlord's neglect to repair. (p. 693.)

LANDLORD'S LIABILITY to Tenant's Family for Contagious Disease.—A landlord who leased premises, knowing them to be infected with diphtheria, and concealing that fact from the tenant, is liable for the death of one of the tenant's family from the disease; but if he did not have actual knowledge of the condition of the property, and the tenant must have known of the existence of noxious odors and the like as soon as the tenancy began, then the tenant has no right to continue the exposure of his family to the danger, and so aggravate the damage. (pp. 697, 698.)

William M. P. Bowen, for the plaintiff.

Robert W. Burbank, for the defendant.

¹⁸⁰ DOUGLAS, J. This action is brought under the provisions of General Laws, caption 233, section 14, which provides that: "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages," etc.

The plaintiff is the father and the sole beneficiary of George L. Davis, whose death, while an infant, he alleges was caused by the failure of the defendant to repair the drains in a dwelling-house where the deceased resided.

The case is certified to this division on substantial demurrer to the declaration. The declaration is in two counts. The first alleges that the defendant, being the owner of a certain dwelling-house, leased the lower tenement therein to "the plaintiff and his family for the habitation of said lower tenement and the appurtenances thereof by said plaintiff and said plaintiff's family as tenants from month to month"; that the defendant agreed to keep the premises in repair, and thereupon it became her duty to do so; that she neglected this duty by suffering a water-closet and its appurtenances to be out of repair, foul and stopped up, emitting gases and odors prejudicial to life and health of the plaintiff and his family; that the "said defendant,

to wit, the agent of said defendant," knew or by the exercise of due care ought to have known of the condition of the closet, etc.; that the said child, while occupying the premises, was injured by the odor and gases emitted by the water-closet, and became sick and thereby contracted diphtheria, of which he died.

The second avers a similar letting to "plaintiff and his family"; that the water-closet and drains were old, unsafe, out of repair and the dangerous condition of them was known to the defendant, to wit, defendant's agent; that "the said defendant, to wit, said agent," knew that a child had previously died in said tenement by reason of said dangerous condition; that the plaintiff and his deceased child entered ¹⁸¹ upon the premises not knowing its dangerous condition, and the plaintiff and his child could not by due care ascertain such condition; that this condition was not patent or ascertainable by examination and inquiry; that the defendant owed to the plaintiff and his child the duty of informing them of this condition; that the defendant, disregarding this duty, falsely represented to the plaintiff and to his minor child that said premises were in good condition whereby the plaintiff and his child were induced to enter and occupy said premises; that by exposure to the odors and gases emitted from the defective water-closet and drains, the child became sick and in a condition to contract disease and did contract diphtheria and died.

There are several obvious defects of form in both these counts which would require amendment before a defendant could intelligently plead to them. The letting set forth in both counts is to "the plaintiff and his family," and the representations set out in the second count are to the plaintiff and his minor child, an infant "of tender years." The absurdity of such allegations is an embarrassment when we take them up for serious consideration. Does the pleader expect to prove, as he has alleged, that the plaintiff and his family, presumably his wife and children, took a joint verbal lease of this tenement, and that the landlord negotiated with and made representations and promises to a child of tender years who had no legal capacity to enter into a contract or to understand the conditions which were under discussion? But aside from the remarkable character of the allegation, the word "family" is too indefinite to describe a party to a contract. The only proper way to set out the parties to a contract is by their names, and the child is not named as a tenant. For all that appears in the first count, he may not have been born when the lease was made.

The repeated allegation that "the defendant, to wit, the defendant's agent," knew or ought to have known, is not a sufficient allegation for any purpose. If the relation between principal and agent was such that actual knowledge by the agent would be imputed by law to the principal, such relation¹³² should be set out, or knowledge should be alleged in the principal and no mention made of the agent. Some of these defects of pleading may be cured by amendment, and the points raised by the demurrers and argued by counsel, which go to the substance of the case, may be considered.

The demurrer to the first count raises the question whether a landlord who has agreed with his tenant to make repairs is liable in tort to a member of the tenant's family who receives personal injuries from the landlord's neglect to repair.

The plaintiff's counsel seems to think that by assuming the lease to have been made to the injured party some advantage is secured, whereas the contrary is true: Taylor on Landlord and Tenant, 9th ed., secs. 175, 175a; *Perez v. Rabaud*, 76 Tex. 191, 193, 13 S. W. 177, 7 L. R. A. 620. The liabilities of a landlord to a stranger do not arise from contract and are greater than those which he assumes to a tenant and members of the tenant's family.

The courts very generally hold that the tenant and his wife, children, servants and guests cannot sue in tort for breach of the landlord's covenant to repair. Strangers in certain cases may do so, but the tenant's remedy is only on the contract.

In *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 174, 13 N. E. 465, the court say: "The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. . . . As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract," and again: "We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor and had unreasonably delayed in performing the contract."

Thompson v. Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580, was brought by the wife of a tenant to recover damages for personal injuries sustained by falling through the floor of a porch attached to a house rented by her husband. The declaration alleged that the defendant had promised "to keep and maintain the premises in good, safe and perfect condition." The court held that, whether the action be *ex contractu* by the

tenant himself, or ¹³³ ex delicto by a stranger to the contract, the rule of damages for injury caused by mere breach of the contract is the same and does not include damages for personal injuries. "We have no doubt," say the court, page 207 (96 Md.), "that no action, either in contract or in tort, by a tenant, or one of his family, against a landlord to recover damages for personal injuries should be sustained merely because the latter has been guilty of a breach of contract to make necessary repairs in the premises demised. It is not denied by counsel that such damages are too remote, and not in contemplation of the parties, to be recovered in an action ex contractu, and to permit a recovery for such damages based on the contract simply because it is in form an action of tort would be making a distinction that could not be justified by reason or authority."

Schick v. Fleischhauer, 26 N. Y. App. Div. 210, 49 N. Y. Supp. 692, holds that no duty to repair rests upon a landlord except what is created by agreement, that the measure of damages is the expense of doing the work which the landlord agreed to do but did not. "A contract to repair does not contemplate, as damages for failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, or, if the premises are made untenable by reason of the breach of the contract, the tenant may move out and defend in an action for the rent as upon an eviction.

"The tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition and to stay there at the risk of receiving injury on account of the defects in the premises and then recover as for negligence for any injuries that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence. In such a case the liability of one of the parties to the other because of negligence is based either on the breach of some duty which is implied as the result of ¹³⁴ entering into the contractual relation, or from the improper manner of doing some act which the contract provided for; but the mere violation of a contract, where there is no general duty, is not the subject of an action or tort: Courtenay v. Earle, 10 Com. B. 73."

In *Collins v. Karatopsky*, 36 Ark. 316, it was held that damages sustained by a lessee in the death of a member of his family from the lessor's neglect to repair and improve the premises as contracted in the lease are too remote. The same is held of injuries from falling into a cistern which the landlord had promised to repair: *Hamilton v. Feary*, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N. E. 48. *Spellman v. Bannigan*, 36 Hun, 174, was a case where the plaintiff was injured by the falling of stairs which the landlord had agreed to repair, and the same principle was followed.

The New York cases, as well as others, are commented upon in *Sanders v. Smith*, 5 Misc. Rep. 1, 25 N. Y. Supp. 125, and the dictum of Judge Earl in *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 248, 50 Am. Rep. 659, that "if a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured," is said to be contrary to sound reason and the whole current of authority in New York and elsewhere.

The later case of *Miller v. Rinaldo*, 21 Misc. Rep. 470, 47 N. Y. Supp. 636, was an action brought by a minor child, who was injured by the fall upon him of a portion of the ceiling in apartments in which he lived with his parents, tenants of the defendants, under a monthly lease, and the ground of the action was the defendants' neglect to repair after they had promised to do so. The court says: "Assuming that the promise was enforceable and that the individual who made it had authority to bind the defendants, still the recovery may not be supported." And the grounds assigned for the decision are that the right to require repairs is founded on contract alone, and that only such damages can be recovered from a breach of it as could be recovered from any contractor who fails to perform his work. The dictum of Judge Earl is disapproved in *Edwards v. New York etc. R. R. Co.*

¹²⁵ The plaintiff cites *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736, 53 Atl. 268, 60 L. R. A. 133, as supporting his right to sue in case for breach of the agreement to repair. The words of the opinion to which he refers are, page 435 (24 R. I.): "The basis of a cause of action for injury to a person by reason of negligence or want of due care, is the breach of some duty or the nonobservance of some obligation that the defendant is under to the plaintiff."

This is very different from saying that an action of tort lies for the breach of one's duty to keep his promise or his obligation to pay his debts.

The text-book which he cites to the same point, 18 American and English Encyclopedia of Law, second edition, page 231, holds that: "An action of tort will not lie for the total failure of the landlord to repair according to his agreement." The cases which he cites to show the landlord's liability for damages caused by a nuisance on the leased premises relate to his liability to strangers who have not the power, as the tenant has, to abate the nuisance at the landlord's expense: 2 McAdams on Landlord and Tenant, 3d ed., p. 1247.

Moore v. Steljes, 69 Fed. 518, where it was held that a child of the tenant might recover against the landlord for injuries occasioned by a falling ceiling, is the only case we have found which imposes on the landlord such liability to members of the tenant's family, or to persons on the premises by invitation of the tenant. The opinion is based upon a paragraph in Wood on Landlord and Tenant, 735, which relates to a landlord's liability to third persons. The learned court evidently overlooked the distinction which all the authorities make.

The case of Joyce v. Martin, 15 R. I. 558, 10 Atl. 620, was a suit by a stranger against the owner of a wharf used by the public: See opinion in Henson v. Beckwith, 20 R. I. 167, 78 Am. St. Rep. 847, 37 Atl. 702, 38 L. R. A. 716. Railton v. Taylor, 20 R. I. 279, 38 Atl. 980, 39 L. R. A. 246, was an action on the case for the negligence of the landlord in managing a heating apparatus which he retained control of, whereby his tenant was injured.

It is held in Scott v. Simons, 54 N. H. 426, that a landlord is liable to a tenant or a stranger for negligence in constructing a drain; but it is also held that such negligence must be positive and actual. The case was sent back for a new trial to ascertain the facts, both in regard to negligence of the landlord¹³⁶ and contributory negligence of the tenant. The opinion is not in point here.

As the first count in the plaintiff's declaration is framed in tort, it states no cause of action, and the demurrer to it must be sustained. The second count is based upon the claim that the defendant has committed a wrong, independent of her breach of contract, which makes her liable for the death of the child.

The law on this subject is laid down with substantial uniformity by the authorities. Mr. Taylor says (Taylor on Landlord

and Tenant, 9th ed., sec. 175a): "As the lessor does not warrant the condition of the premises, and the tenant, because he can inspect them, assumes the risk of their condition, for any injury suffered by him during his occupancy on account of their defective condition, or even faulty construction, the tenant cannot make the lessor answerable unless there was misrepresentation, active concealment, or, perhaps, total inability on the tenant's part to discover the defect before entry."

In Wood on Landlord and Tenant, page 921, it is said: "To the tenant, the landlord is not liable for a nuisance existing on the premises at the time when the lease was made, nor for defects therein, unless the defect is latent, and the landlord has been guilty of fraud or actual concealment or deceit in the letting."

If one knowingly lets premises infected with a contagious disease, and fails to inform the tenant thereof, he is liable for injury resulting therefrom: 18 Ency. of Law, 2d ed., 224, citing *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Snyder v. Gorden*, 46 Hun, 538; *Span v. Ely*, 8 Hun, 256.

The landlord on his failure to disclose concealed defects in the demised premises is liable for injuries to the family or guests of the tenant, as well as for injuries directly to the tenant; citing *Edwards v. New York etc. R. R. Co.*, 98 N. Y. 249, 50 Am. Rep. 659; *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891. See, also, *Wallace v. Lent*, 1 Daly (N. Y.), 481; *Blake v. Ranous*, 25 Ill. App. 486; *Capen v. Hall*, 21 R. I. 364, 43 Atl. 847; *Whitehead v. Comstock & Co.*, 25 R. I. 423, 426, 56 Atl. 446.

¹³⁷ If, in the case at bar, the defendant had known that the premises were infected with the germs of diphtheria, and had concealed that fact from the plaintiff, and the child immediately upon entering the house had contracted the disease, no doubt the defendant would be liable in damages: *Snyder v. Gorden*, 46 Hun, 538; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164. So, also, if the defendant had known that the drains were in a dangerous condition and liable by ordinary use to become a source of disease before the tenants could discover that they were out of order. The defendant does not deny that in such a case she would be responsible, but demurs because she says no such case is stated.

As we have seen above the allegation of knowledge by the defendant's agent is not sufficient to charge the defendant with actual knowledge and fraudulent concealment so long as the relation of the agent to the defendant is not set out. Again, the fact that at some time, not alleged to be recent, a death from diphtheria occurred in the house is no allegation that the house was infected at the time the plaintiff hired. Evidence of such an event within a short time might tend to show knowledge of infection, but the fact which ought to be alleged is the actual knowledge, not the evidence from which it may be inferred.

The existence of foul, noxious and unwholesome odors and the stopping up of the water-closet are facts in their nature incapable of concealment. They must have become known as soon as the occupation of the tenement began, and the tenant had no right to continue the exposure of his family to such dangerous conditions and so aggravate the damage.

Again, it is not alleged that the child contracted diphtheria in the house, or that the alleged fault of the defendant directly caused its death. We are unable to say whether these defects in the count may be merely errors in setting out a meritorious case; but unless they can be cured by amendment in accordance with the fact, the plaintiff has no cause of action.

It is objected, to the whole declaration, that the first count is in assumpsit, and the second in case, and hence the declaration ¹³⁸ is bad for misjoinder of causes of action. This objection would be good if the first count were clearly in assumpsit; but while it is not absolutely certain how it should be classed, the pleader evidently intended to declare in tort, and we have considered it such in form, though it lacks the substance, as no legal duty is set out. We must therefore overrule this objection.

The demurrers to the several counts are sustained, for the reasons given above, and the case will be remitted to the common pleas division for further proceedings.

The Liability of a Landlord for the defective or dangerous conditions of the demised property, to the tenants and others who suffer injury therefrom, is discussed in the monographic note to *Griffin v. Jackson Light etc. Co.*, 92 Am. St. Rep. 499-547, and in the subsequent case of *Brady v. Klein*, 133 Mich. 422, 103 Am. St. Rep. 455.

MILLER v. SMITH.

[26 R. I. 146, 58 Atl. 634.]

FOREIGN CORPORATION—Stockholders' Liability.—An Action to enforce a stockholder's liability to contribute proportionally with other stockholders to a fund to pay the debts of the corporation, must ordinarily be brought in the state where the corporation is located, since there only can its obligations be ascertained, its officers controlled, and its assets marshaled. (p. 702.)

FOREIGN CORPORATION—Stockholders' Liability.—Proceedings to enforce the proportionate liability of stockholders in other states cannot be equitably taken until such liability has been ascertained in the state of the domicile of the corporation. (p. 702.)

FOREIGN CORPORATION—Stockholders' Liability.—Where the obligation of a stockholder is secondary to that of the corporation and proportional to that of other stockholders, it will not be enforced in other states, unless the equities between all stockholders and all creditors can be administered. (p. 702.)

Edward D. Bassett, for the complainants.

Edwards & Angell, for the respondent.

147 DOUGLAS, J. This is a bill in equity, brought by citizens of Denver, Colorado, who were depositors in and now are creditors of the State Bank of Monte Vista, a corporation organized under the laws of the state of Colorado, and which has become insolvent and has assigned its property for the benefit of its creditors, on behalf of themselves and all other similar creditors of said bank who may choose to come into the case, against a citizen of Rhode Island, who was the owner of ten shares of the capital stock of said bank at the time said deposits were made.

The bill states these facts and alleges further that at the time of the failure the bank owed the complainants \$3,950.63, of which nineteen and one-half per cent has been paid, leaving now due to them \$3,180.26; that the capital stock of the bank was \$80,000, divided into eight hundred shares of \$100 each. That the total amount of the indebtedness of the bank at the time of the failure was \$80,651.64. That the laws of the state of Colorado, at the organization of said bank and now in force, provided as follows (Laws 1885, 264, sec. 1; 1 Mills Annotated Statutes, sec. 533): "Shareholders in banks, savings banks, trust, deposit and security associations shall be held individually responsible for debts, contracts, and engagements

of the said associations, in double the amount of the par value of the stock owned by them respectively," and that by virtue of this statute the respondent is individually indebted to the complainants and all others similarly situated, in the sum of \$2,000, with interest from the fifteenth day of June, 1899, at eight per cent per annum.

¹⁴⁸ To this bill the respondent demurs, on the grounds: 1. That it does not appear by the bill that the assets of the bank have been exhausted; 2. That the statute of Colorado, upon which the respondent's liability is founded, ought not to be enforced by this court; 3. That the Colorado statute contemplates a proceeding in equity in that state by the creditors of the corporation against all the stockholders thereof, for the purpose of establishing a pro rata liability, and until such proceeding has been had this court cannot justly enforce the liability against a single stockholder.

It is important, in the first place, to consider the exact purport of the statute under which the claim is made. There is no uniformity among the several states in the provisions of their statutes on this subject, and hence the diversity of opinion of the courts as to these obligations is very great.

The Colorado statute went into effect March 25, 1885, and was construed by the supreme court of that state at the September term 1898, in the case of *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565. The court there distinguished two classes of statutes, imposing upon stockholders liability beyond their subscriptions for stock for the debts of the corporation. One class imposes a primary and direct liability, such as a member of a copartnership is subject to, toward the creditors of the firm and another class provides only for contribution to a fund to be distributed by a court of equity amongst the creditors generally.

The court, adopting the view taken by the supreme court of the United States in construing a similar statute in *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864, and by the court of appeals of New York in *Pfohl v. Simpson*, 74 N. Y. 137, expressly place the statute under consideration in the second class. They quote with approbation the words of Chief Justice Waite: "Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made apply to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, ¹⁴⁹ it must be enforced by or for all. The form of the

action, therefore, should be one adapted to the protection of all"; and also from the opinion by Judge Folger, in the New York case: "A suit in equity laying hold of all the stockholders in like category and promoted for the benefit of all creditors having like interest, is peculiarly adapted to work out exactly just and equitable results. . . . The object and effect is only to bring to one forum the determination of rights, which must, if prosecuted separately, more or less conflict to mutual harm. Before that one forum, in one suit, the respective rights and the respective liabilities can be ascertained and determined, and each get his own, and be subjected to his own, and not another's. And the equities between the respective stockholders can also be adjusted and settled"; and add: "We are satisfied that both upon reason and authority the additional liability of stockholders imposed by our statute constitutes a fund for the benefit of all the creditors, which may be pursued in equity for their common benefit, by or for all."

The opinion holds, further, that this remedy is in the hands of the creditors and is not available to the assignee, as the fund is no part of the assets of the corporation as unpaid subscriptions would be; that after insolvency the remedy is immediately available; that in any such action all defenses to the claims are open to the respondents; that the extent of the liability is double the amount of the par value of the stock in addition to any balance of subscription remaining unpaid, and that interest on the claims is recoverable.

Upon the extent of liability the court quote again from *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864: "This, as we think, means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations."

There can be no doubt from these expressions of the court and the language of the quotations which they adopt that the liability imposed on a stockholder by this statute, in their opinion, is to contribute proportionally with other stockholders ¹⁵⁰ to a fund sufficient to pay the debts of the corporation, and that this liability must be ascertained in a forum where the amount of debts can be ascertained and the proportionate liability to contribute can be adjusted among the stockholders. If the construction placed upon their own statute by the Colorado court is correct, and such construction is held to be binding upon other courts (*Pulsifer v. Greene*, 96 Me. 438,

52 Atl. 921; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346, 42 L. R. A. 804; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44 L. ed. 619) their conclusion as to the remedy is unquestionable.

In *Cuykendall v. Miles*, 10 Fed. 342, Lowell, C. J., says: "The supreme court hold that the mode in which a liability of this sort is to be enforced depends entirely upon the particular law governing the corporation. If that law merely provides for a proportionate liability of all stockholders for all debts, there should be a bill in equity for the benefit of all the creditors and against all the stockholders: *Pollard v. Bailey*, 20 Wall. 520 [22 L. ed. 376]; *Terry v. Tubman*, 92 U. S. 156 [23 L. ed. 537]; *Terry v. Little*, 101 U. S. 216 [25 L. ed. 864]." Such an action must, in ordinary cases, be brought in the state where the corporation is located. There only can its obligations be ascertained, its officers be controlled, and its assets be marshaled. There will usually be found most of its stockholders, and only there can their mutual rights and obligations be adjusted.

It is not enough that one creditor sues for all who may choose to come in; there should be some actual representation of the body of creditors in the prosecution of the suit, which will insure that the contribution enforced by the suit shall go into the common fund. Whether any such representation for the purpose of collecting outside contributions is provided for by the law of Colorado, we need not inquire.

In *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565, the court say that the assignee could not enforce the liability. In *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864, it is said by Chief Justice Waite: "If the object is to provide a fund out of which all creditors are to be paid share and share alike, it needs no argument to show that one creditor should not be permitted to ¹⁵¹ appropriate to himself, without regard to the rights of others, that which is to make up the fund."

Whatever proceedings may be proper to enforce their proportionate liability upon stockholders in other states, such proceedings cannot be equitably taken until such liability has been ascertained in the state of the domicile of the corporation. Nothing could be more unjust than to permit a creditor or a number of creditors to recover from a foreign stockholder to the full limit to his liability, when other stockholders residing in the home state were only required to contribute a less proportion of their stock.

In the case at bar, as pointed out by defendant's counsel, it appears by the bill that the capital stock was \$80,000; hence the maximum liability of the stockholders for the payment of debts is \$160,000. The indebtedness is \$64,000, which is forty per cent of the total liability. If suit were brought in Colorado only this forty per cent might be assessed against a resident stockholder, while in this suit one hundred per cent is demanded.

These principles are not founded upon any doubtful discriminations as to the essential nature of the obligation. Courts which carry the practice of interstate comity to the farthest limit agree that where the obligation of the stockholder is secondary to that of the corporation and proportional to that of other stockholders, it will not be enforced in other jurisdictions unless the equities between all stockholders and all creditors can be administered.

A few citations from the multitude of decisions on this subject will illustrate this. In *Cleveland Co. v. Kent*, 87 Hun, 329, 34 N. Y. Supp. 427, it was held that an action in equity to enforce the liability under the Ohio statute of stockholders of an insolvent Ohio corporation is not maintainable in the courts of New York. The court say: "If this were an action at law to enforce a statutory liability for a right given by an Ohio statute to an individual creditor against an individual stockholder, then this court would have, and could assume, jurisdiction. Where, however, an action in equity is necessary, and where, as here, ¹⁵² what is sought is an accounting between creditors and stockholders to enforce a remedy given by the Ohio statute, in which suit it is necessary to have a marshaling of assets and an accounting between creditors and stockholders and a determination of the amount of liability respectively of each individual stockholder, such a suit, in the absence of the corporation itself, and in the absence of all those interested in the accounting, notably creditors, over whom it is not shown that the court can acquire jurisdiction, should not be maintained in this state."

In *Howarth v. Lombard*, 175 Mass. 570, 575, 56 N. E. 888, 49 L. R. A. 301, decided in 1900, the court say of the obligation of a stockholder imposed by the law of a foreign state: "Such a right ought to be enforceable. Inasmuch as the nature of it and the method of enforcing it depend upon the statute which enters into the implied contract, we must look to the statute to ascertain its extent and the manner of enforcing it. If it is of such a nature as to call for local proceedings in

the state where the corporation is, in order to adjust equities, such proceedings must be had, and it cannot be made effectual without them. Most of the cases in which creditors of foreign corporations have been refused relief in this commonwealth have shown rights which, under the statutes creating them, could not properly be enforced without proceedings in the foreign state whereby equities could be adjusted. In the present case, as the statute has been construed, it is plain that no action can be maintained against a stockholder until after proceedings in a court of Washington, showing the insolvency of the corporation and the need of payment to satisfy the claims of creditors. After such proceedings and an adjustment of the rights and liabilities of the corporation, of creditors, and of stockholders, collection can be made from stockholders wherever they are found."

Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 138, was a case decided in the United States circuit court of appeals for the sixth circuit, brought to enforce the liability of a resident of Kentucky who was a stockholder in an Ohio corporation. In that case suit had been brought in Ohio, and the amount assessable ¹⁵⁸ upon each stockholder had been determined. The court say, page 6 (107 Fed.): "Is the remedy afforded by the courts of Ohio of such a peculiar local nature that it would be inequitable to undertake to enforce it in another jurisdiction? Will such enforcement work a hardship and inflict an additional burden upon foreign stockholders? It may be admitted that, if such will be the effect of undertaking to enforce the liability, a court of another jurisdiction will withhold relief: *Fourth Nat. Bank of New York v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. Rep. 757, 30 L. ed. 825. In that case Mr. Justice Gray, delivering the opinion of the court, said: 'In all the diversity of opinion in the courts of the different states upon the question how far a liability imposed upon stockholders in a corporation by the law of the state which creates it can be pursued in a court held beyond the limits of that state, no case has been found in which such a liability has been enforced by any court without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders.' "

Aultman's Appeal, 98 Pa. St. 505, which is an apparent ex-

ception to this statement, is disapproved in *Post & Co. v. Toledo R. R. Co.*, 144 Mass. 342, 59 Am. Rep. 86, 11 N. E. 540, but may be distinguished from other ordinary cases by the fact that all creditors and all the stockholders of the corporation were residents of Pennsylvania.

Two cases have been recently decided in the circuit court of appeals for the first circuit, the court being differently constituted in each case, but both the opinions having been delivered by Judge Aldrich, in which the necessity for preliminary action in the court having jurisdiction of the corporation is insisted on.

The case of *State Bank of Cleveland v. Sayward*, 86 Fed. 45, was begun in the United States circuit court for the district of Massachusetts, by a creditor of an Ohio corporation against stockholders, residents of Massachusetts. It was dismissed by Judge Colt, who held that "a bill in equity cannot be ¹⁵⁴ maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another state," quoting from *Post & Co. v. Toledo Railroad Co.*, 144 Mass. 345, 59 Am. Rep. 86, 11 N. E. 540, the words of Chief Justice Field: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created. . . . If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the state under which the corporation is created, the courts of that state alone can afford complete and effectual judicial relief."

The case came up in the circuit court of appeals (*State Nat. Bank v. Sayward*, 91 Fed. 443, 33 C. C. A. 564), and was decided January 19, 1899..

After citing the decisions of the court of Ohio, holding that the obligation under the statute was contributive and required an equitable action to enforce it, the court very clearly demonstrate the impossibility of doing justice to the parties in a court which has not jurisdiction of the corporation and only of a portion of the stockholders and creditors. Amongst other things, the court say: "In this case, with a joinder of parties which includes neither all the creditors, all the stockholders,

nor the debtor corporation, administering this law in another jurisdiction upon lines of comity or right, as it may be, we ought not to be expected to do what the state court, administering the law of the state creating the liability, would not and could not fairly and equitably do in a like proceeding with like parties. . . . Should this court upon statutory grounds, on lines of comity, give an extraterritorial remedy beyond that of the parent forum? Should this court, upon lines of equity or comity, give to an Ohio creditor a remedy against a Massachusetts stockholder which the Ohio statute and home forum denies to an Ohio creditor under like circumstances against a Massachusetts stockholder, and which ¹⁵⁵ it denies to an Ohio creditor against an Ohio stockholder under like circumstances?"

In *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240, decided May 31, 1899, a receiver especially appointed by a Minnesota court to enforce the statutory liability of stockholders in a Minnesota corporation brought an action at law in the Massachusetts district in aid of an equity proceeding in the corporate domicile. A majority of the court sustained the action. In the course of the very careful argument of the majority it is said: "In a recent case in this circuit, involving the Ohio statute (*State Bank of Cleveland v. Sayward*, 91 Fed. 443, 33 C. C. A. 564), some observations were made as to what the Ohio statute contemplated as to procedure, and what was intended should be done in the home state before liability under that statute could be enforced extraterritorially, without intimating what would have been done in that case if the joinder and ascertainments contemplated by such statute had been made. Relief was denied therein, for the reason that what was contemplated as to ascertainments and joinder had not been done." And again, page 754 (95 Fed.): "To enforce extraterritorially the individual stockholder liability created by statute, and to entitle the creditors, or the parties representing them, to judgment, it is incumbent upon plaintiffs to show that the ascertainments intended by the statute have been made."

In *Bates v. Day*, 198 Pa. St. 513, 82 Am. St. Rep. 811, 48 Atl. 407, the supreme court of Pennsylvania refused to entertain a suit brought by several creditors of a Colorado bank against a single stockholder residing in Pennsylvania, because the corporation and the other stockholders were not parties. The court say: "No authority has been cited to sustain the right to a separate bill in equity, in a foreign jurisdiction, by part of the creditors, against part of the stockholders, where

the corporation is not a party. On the contrary, the trend of judicial opinion is the other way. In *Cushing v. Perot*, 175 Pa. St. 73, 52 Am. St. Rep. 835, 34 Atl. 447, 34 L. R. A. 737, our Brother Mitchell points out the advantage of an action for the benefit of all creditors, saying: 'In this manner the rights of all will be protected, and justice be done in a single proceeding, in which ¹⁵⁶ everyone will get what is his due. No one will be called upon to pay more than his fair proportion; and the expense, delay and inevitable occasional injustice of separate actions by different creditors against different stockholders, with their attendant legion of resulting actions for contribution, will be avoided. This is so consonant with convenience and natural justice, as well as with our own settled procedure in analogous cases, that we will not be easily moved to depart from it.'

The principle asserted by these opinions is so reasonable that further citation of authorities seems to us unnecessary.

The third ground of the respondent's demurrer must be sustained, and we need not discuss the other objections to the bill.

The Liability of Stockholders in a foreign corporation cannot be enforced in a state other than the state of incorporation by a suit in equity in which part only of the creditors are made parties plaintiff and only one stockholder is made party defendant. To maintain such a suit, it must be in behalf of all the creditors and against all the stockholders, and the corporation itself must be made a party: *Bates v. Day*, 198 Pa. St. 513, 82 Am. St. Rep. 811. The personal liability of a stockholder in a Colorado corporation will not be enforced in Massachusetts by a bill in equity to which the corporation and other stockholders are not parties: *Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376.

ANGELL v. REYNOLDS.

[26 R. I. 160, 58 Atl. 625.]

ALIENATION OF AFFECTIONS—Mitigation of Damages.—

In an action for alienating the affections of a husband the defendant may show, in mitigation of damages, that other women than herself maintained improper relations with the husband, although this fact was unknown to the plaintiff. (p. 710.)

Irving Champlin, for the plaintiff.

Franklin P. Owen, for the defendant.

¹⁶⁰ TILLINGHAST, J. This is an action of trespass on the case for alienating the affection of the plaintiff's husband,

whereby she alleges that she wholly lost his society, aid and support.

At the trial of the case in the common pleas division a verdict was rendered in favor of the plaintiff, and her damages were assessed at the sum of fifteen hundred dollars. The case is now before us on the defendant's petition for a new trial on the grounds that the verdict was against the evidence, and that certain rulings of the trial court were erroneous.

The rulings specially relied on by defendant's counsel as being erroneous, and the only ones which we feel called upon to consider, were those relating to certain testimony offered, and certain refusal of requests to charge, bearing upon the question of damages.

The defendant offered to prove, in substance, that plaintiff's husband had been improperly familiar with other women than herself, during the same period that she was charged with having maintained illicit relations with him, and hence that she was not responsible, in any event, for all the damages which the plaintiff had sustained in the premises. In other words, the defendant's contention in effect was that the plaintiff's husband was a man of general bad character as a husband,¹⁶¹ and hence that the plaintiff could not look to her for all the damages which she had sustained thereby.

However ungracious or even odious such a defense may seem to be from a purely moral standpoint, it is doubtless one which a defendant may interpose in a case of this sort. The question here is, How much has the plaintiff been damaged by the wrongful acts of the defendant in the premises, and not by the wrongful acts of others in the same direction? And if it should be made to appear that the husband's affection for his wife had, for any cause commenced to wane before his intimacy with the defendant commenced, and that the defendant, taking advantage of that condition of things, secured for herself what there was left of his love for his wife, she can only be legally called upon to make the plaintiff whole for the share thereof which she thus took from her. Or, to state it differently, what was the loss which the plaintiff sustained by reason of the part which the defendant took in the premises?

It is true, this may seem like an impossible question for a jury to answer. For how far the charms and blandishments of one woman, as compared with those of another or of others, may go in accomplishing the total destruction of a husband's affection for his wife, cannot be determined by any mathematical rules.

But yet, like many other questions in practical life, it is capable of a reasonable solution.

The law bearing upon the question under consideration doubtless is that "evidence in mitigation of damages will be received if it tends to show that the plaintiff has, in fact, suffered less injury than would otherwise be a probable inference from the acts proved": Sutherland on Damages, 3d ed., sec. 745. Hence, in a case of this sort it is proper to show unhappy relations between the plaintiff and her husband, or that she was wanting in affection for him (Hadley v. Heywood, 121 Mass. 236; Coleman v. White, 43 Ind. 429; Palmer v. Crook, 7 Gray, 418; Peek v. Traylor, 17 Ky. Law Rep. 1312, 34 S. W. 705; Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438; Rose v. Mitchell, 21 R. I. 270, 43 Atl. 67), or that there had been improper familiarities between him and other women: Norton v. Warner, 9 Conn. 172; Waldron v. Waldron, 45 Fed. 315. In Bailey v. Bailey, 94 Iowa, 598, 63 N. W. 341, which was an action by a ¹⁶² wife against her father in law for alienating the affections of her husband, it was held to be reversible error to exclude evidence showing what the husband's state of mind toward his wife was, and that other causes than the defendant's acts had to do with the alienation.

In Churchill v. Lewis, 17 Abb. N. C. 226, it was held that the true relations between the plaintiff and her husband, and whether happy or otherwise, before the acquaintance with defendant; the state of his feeling and the extent of his affections toward his wife, and the effect produced upon the plaintiff by the existence of the relations between her husband and the defendant, as they appeared to her at the time, may be considered by the jury in estimating the damages. Prettyman v. Williamson, 1 Penne. (Del.) 224, 39 Atl. 731; Schorn v. Berry, 63 Hun, 110, Browning v. Jones, 52 Ill. App. 597, 1 Greenleaf on Evidence, 13th ed., sec. 102, Cooley on Torts, 2d ed., pp. 263, 264, Abbott's Trial Evidence, 686, 1 Encyclopedia of Evidence, pp. 765, 766, and cases cited, 2 Hilliard on Torts, p. 509, sec. 21, are amongst the numerous authorities to the same general effect.

But plaintiff's counsel contends that, even conceding that her husband had improper relations with other women than the defendant, yet, as the evidence shows that the plaintiff was not aware of that fact, and that as he was affectionate toward her, and made a satisfactory husband until the defendant interfered in the premises, it was not competent for the plaintiff to prove

his secret vices unless it could also be shown that they resulted to the injury of the plaintiff.

We cannot agree with this contention. A wife is entitled to the full and undivided conjugal affection of her husband, and it is quite impossible that she should enjoy this right if he is improperly familiar with other women. There must necessarily be at least a weakening of the affections, or what is technically known as "the loss of consortium," in every such case—that is, a deprivation of the full society, affection and assistance to which a wife is entitled—and hence, whether she has knowledge of the wrong or not, it cannot fail to result to her injury. The marital rights of a woman are unlawfully ¹⁶³ invaded whenever anyone steps in between her and her husband, whether with or without her knowledge, and secures any part of the society, affection or assistance which belongs to her. And for such unlawful act the wife is entitled to be remunerated in damages.

It follows, then, in the case at bar, that if the defendant could show that others than herself had also been guilty of alienating the affection of the plaintiff's husband to any extent, although this fact was unknown to the plaintiff, she had the right to do so in mitigation of damages: *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102.

An examination of the evidence in the case shows that up to the time when the plaintiff's husband went away with the defendant he furnished her with a comfortable support, paying over to her his entire wages and contributing generally to her comfort and happiness; but that, after the defendant interfered in the premises and won his affection, he absolutely neglected the plaintiff, giving her no money for food or clothing, so that she was obliged to procure the necessaries of life as best she could.

It also appears by the uncontradicted testimony in the case that the plaintiff and her husband were fond of each other and had no trouble until he became acquainted with the defendant; that the latter wrote him a large number of love letters, wherein it appears that she had great affection for him—that she desired to marry him; that she made appointments to meet him in Providence and elsewhere for improper purposes; that she was unwilling that this intimacy should cease, although he desired it; and that in all these matters she was the aggressive party.

In view of these facts and of the further fact that the defendant did not personally deny any of the charges made against

her, and did not even testify in her own behalf at the trial, it appears beyond question that, even if she was not guilty of alienating the affections of the plaintiff's husband as a whole, yet she was the main cause thereof. And hence, while a new trial must be granted, on account of the error of the trial court in ruling out the evidence which was ¹⁶⁴ offered in mitigation of damages, as aforesaid, there is no occasion for a new trial on the merits of the case, and we will therefore grant a new trial, the same to be limited to the question of damages only.

Case remanded for a new trial in accordance with this opinion.

That a Wife may Maintain an Action against another woman for seducing her husband and alienating his affections, see *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989. As to the measure of damages in such a case, see the note to *Clow v. Chapman*, 46 Am. St. Rep. 477.

NELSON v. NARRAGANSETT ELECTRIC LIGHTING CO.

[26 B. L. 258, 58 Atl. 802.]

NEGLIGENCE—Proximate Cause.—Where the trolley pole of a car slips from the wire at a curve in the street and strikes an electric light, causing the globe to fall to the ground, the placing of the light in close proximity to the trolley wire is not the proximate cause of an injury to a person in the street from the falling globe. (p. 714.)

EVIDENCE.—Judicial Notice will be Taken of the fact that an electric lighting company cannot erect and maintain its lights in the streets of a city without authority from the municipality. (p. 714.)

ELECTRIC LIGHT—Negligent Location in Street.—An electric lighting company cannot be charged with negligence in maintaining a light in the street at a point designated by the city government. (pp. 714, 715.)

James A. Williams, David S. Baker and Lewis A. Waterman, for the plaintiffs.

Walter B. Vincent, for the defendant.

²⁶⁸ **TILLINGHAST, J.** These cases are brought to recover damages for injuries alleged to have been sustained by reason of the defendant's negligence in maintaining a certain electric light, surrounded by a glass globe, in such close proximity to an overhead trolley wire of the Union Railroad Company, that

said globe was broken by the trolley pole of the car slipping from the wire as it was going around a curve in the street.

The plaintiff, James S. Nelson, who is the husband of the ²⁵⁹ plaintiff, Annie D. Nelson, sues to recover damages for loss of services of his wife, and for doctor's bills, etc., in consequence of the injuries which his wife sustained by reason of the accident in question, and his wife sues to recover for the personal injuries which she sustained by reason of the falling upon her of the glass globe which was broken as aforesaid. The cases were heard together, and are before us on the defendant's demurrers to the plaintiffs' declarations.

The declarations allege, in substance, that the defendant was the owner of certain electric lighting apparatus, including poles, wires and lamps, for the purpose of lighting the streets of Providence, and that the defendant negligently hung, or permitted to be hung, a certain electric light, surrounded by a glass globe, in such close proximity to an overhead trolley wire of the Union Railroad Company, and so negligently allowed the same to be and remain in such close proximity to the overhead trolley wire at the corner of Dorrance and Weybosset streets, that the glass globe was broken by the pole on the trolley car slipping from the wire as it was going around a curve at the corner of said streets, and striking said globe, thereby causing it to fall upon the plaintiff Annie, who was passing along the street in that vicinity, in consequence of which she suffered injuries while in the exercise of due care on her part.

The grounds of the demurrers are: 1. That it appears from the declarations that the alleged negligence was not the proximate cause of the injury; and 2. That it appears that the defendant was not negligent.

The position taken by plaintiffs' counsel in support of the declarations, briefly stated, is this: Two concurring causes, both in their nature proximate, produced the injury complained of. One of these causes was the placing and maintaining, by the defendant, of the lamp referred to in such close proximity to the trolley wire that the trolley pole was apt to strike it in case the pole slipped from the wire, and the other cause was the happening of just this event.

In view of this coincidence he contends that the case falls within the rule laid down in *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732, ²⁶⁰ where it was held that where two causes combined to produce the injury, both in their nature proximate, the one being the defect in the highway, and the

other some occurrence for which neither party was responsible, the corporation was liable, provided the injury would not have been sustained but for the defect in the highway.

In that case, however, it is to be noted that one of the concurring causes was a natural cause, for which no person was responsible. And the question therefore arises whether the same can be said of one of the causes here, namely, the slipping of the trolley pole from the wire, which certainly was the proximate cause in point of time, at any rate, of the accident in question. Counsel says that the law in the case referred to is applicable to the case at bar. "The slipping of the trolley pole from the wire," he says, "was a pure accident for which no person was responsible; and hence the proximate cause of the accident was the negligence of the defendant in locating its light."

If this position were tenable the case would seem to fall within the rule above stated. But we do not think it is. In the first place, we do not think it can be said that the slipping of the trolley pole from the wire was "a pure accident."

An accident, according to the primary definition thereof, as given in Webster's Unabridged Dictionary, is: "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected."

If, as stated by plaintiffs' counsel in his brief, "It is a well-known fact that trolley poles jump the wire from time to time from various causes, and that this is particularly true in going around curves, as in the case at bar," we fail to see how it can be logically claimed that such an event is "a pure accident" under the definition above given. For a thing which happens so often as to become a well-known fact and a matter of common knowledge, as the fact referred to doubtless is, can hardly be called a pure accident. Again, if it was a pure accident, the defendant was not called upon to anticipate it.

But, even conceding that the slipping of the trolley pole from the wire was a pure accident, as argued, yet it certainly cannot be said, as a matter of law, at any rate, that it was an accident for which no person was responsible; for the trolley pole was a mechanical appliance connected with the running of an electric car which was being operated by the Union Railroad Company, an undoubtedly responsible person.

If this trolley pole had not slipped from the wire the accident would not have happened. And as it was prima facie negligence on the part of the street railway company in not keeping it on

the wire where it belonged, or at any rate in not preventing it from coming in contact with said electric light globe, such negligence, being the independent act of a responsible person, and intervening between the negligence of the defendant (if it was negligent in the premises) and the happening of the accident, broke the causal connection between the two, and hence became and was the proximate cause of the accident: See *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860.

As well argued by counsel for defendant, the placing of the globe in the position where it was, and maintaining it in that position, formed only the condition under which the accident happened, to which, in order for the globe to break, had to be superadded the negligence of the railroad company in so running its car around the curve as to cause the trolley pole to fly from the overhead wire and cause the accident.

Placing and maintaining the globe in the position in which it was at the time of the accident were entirely harmless acts in themselves, and would not have resulted in accident except for the intervention of the force which was brought to bear upon said globe by another party. And hence we think the act of the other party, being *prima facie* a negligent act, was the proximate cause of the accident.

But we think there is another potent reason why the declarations fail to state a case, and it is this: It appears that the lamp in question was a part of an electric lighting apparatus used for the purpose of lighting the streets of the city of Providence. And this being so, it is certainly to be presumed that the poles, wires, and electric lights were located under the direction and with the authority of the city government. ²⁶² For the court will take judicial cognizance of the fact that the defendant could not erect and maintain such structures without authority from the city so to do.

Under this assumption the globe in question was rightfully in the place which it occupied when it was struck and broken by said trolley pole. And, being in the place which was presumably designated for it to occupy as aforesaid, it was rightfully there. And the original act, relied on by plaintiffs as being wrongful (and it must have been wrongful in order to render the defendant liable), not being so, the plaintiffs' claim that it was the proximate cause, or one of the proximate causes, of the accident clearly fails, and for the simple reason that if the defendant was not guilty of a wrongful act in maintaining said globe in said position, no liability can attach to it in the premises.

For, in the absence of some wrongful act on the part of the defendant, no cause of action can arise.

In this connection it is pertinent to remark that, for aught which appears, the defendant may have obtained the right to locate and maintain the lamp in question at that place prior to the time when the trolley wire referred to was erected. And if so, it would seem that it was there by priority of right. But, however this may be, it was presumably there, at the time of the accident, by lawful authority, as already suggested, and hence we do not think the defendant can be charged with negligence in maintaining it there.

Demurrers sustained, and cases remanded for further proceedings.

The Doctrine of Proximate Cause is the subject of a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. The test of proximate cause is whether the facts between the negligent act and the final result constitute a continuous succession of events so linked together that they constitute a natural whole. A cause is not too remote merely because it produces damages by means of an intermediate agency: *Cohn v. May*, 210 Pa. St. 615, 105 Am. St. Rep. 840, and cases cited in the cross-reference note thereto.

STATE v. NARGASHIAN.

[26 R. I. 299, 58 Atl. 953.]

HOMICIDE—Principal and Accessary.—One who is present as an aider and abettor in a homicide is a principal, although another does the killing. (p. 716.)

HOMICIDE Committed Under Coercion.—An instruction in a murder trial, that if the jury believe that the defendant assisted in the homicide, but did so under fear of instant death at the hands of a third person, they are to find him not guilty, is properly refused, as taking no account of any opportunity for the defendant to escape or successfully defend himself, or of the reasonableness of his fear. (p. 719.)

HOMICIDE—Coercion.—Fear Induced by one person is no defense for killing another under its influence. (p. 719.)

HOMICIDE—Coercion.—If One has Sufficient Power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear. (p. 719.)

Charles F. Stearns, attorney general, for the state.

William A. Morgan and Ratcliffe G. E. Hicks, for the defendant.

³⁰⁰ STINESS, C. J. This indictment charged Sarkis Nargashian and Kasper Nigohian with the murder of Peter Ouloosian. Nigohian having absconded, Nargashian was tried alone and convicted. He now petitions for a new trial upon exceptions to alleged errors in charging and refusing to charge, and also upon the ground that the verdict was against the evidence.

The testimony of the defendant shows that he and Nigohian conspired to get the deceased drunk in a saloon, so that he would be unable to meet a girl at a barn as appointed, Nargashian thus to meet the girl in his place. Nigohian took Ouloosian to the barn, Nargashian going there alone, and when the latter went in he found Ouloosian lying on the floor. He says that Nigohian, older and stronger than himself, said to him: "You must help me, so I can kill Peter; if you don't, I will kill you." Nigohian had an ax in his hand. The petitioner testifies: "He told me, 'You must hold his hands,' and I did, and afterward he says, 'You grab his throat so I will get his money out of him.' " He then says that he did this because he was frightened; that Nigohian took the money from Ouloosian, over six hundred dollars, and put it in the petitioner's pocket, and after they went out it was divided equally, the defendant taking it still under threats. The defendant further testified that he did not help kill Ouloosian, because he was dead when he took hold of his hands.

The autopsy by the medical examiner showed that death had been caused by strangulation, and that there were twenty distinct marks of finger-nails on the throat of the deceased.

The defendant asked the court to charge: "If the jury believe that Ouloosian was dead before the defendant took hold of his hands in the barn, then they are to find the defendant ³⁰¹ not guilty." The request was refused, and exception taken.

We think the refusal of the request was correct. Assuming that the killing was done by Nigohian, there is still ample testimony from which the jury could find that Nargashian was present at the time of the homicide, aiding and assisting in it, even though Ouloosian may have been dead when the defendant took hold of his hands. If he were present as an aider and abettor in the crime he would be a principal, although the other did the killing: Bouvier's Law Dictionary, "Aiding and Abetting." The request was too broad in its terms to allow the consideration of these facts, and it was therefore rightly refused.

The second and third requests to charge were: "If the jury believe that the defendant assisted in the killing of Ouloosian, but did so under fear of instant death at the hands of Nigohian, then they are to find the defendant not guilty."

"If the jury believe the testimony of the defendant, then they are to find him not guilty."

The question raised by the defendant under these requests is that of threat and fear of his own death as a defense.

The proposition involved in these requests is a very narrow one, which takes no account of opportunity to escape; to successfully defend himself; the reasonableness of the fear; or other matters which may properly be taken into account. The defendant assumes, from the language used in some cases, that the mere statement of a fear of death is sufficient as a defense.

In the Case of Stratton, 21 St. Tr. 1046-1223, Lord Mansfield said: "Wherever necessity forces a man to do an illegal act, forces him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. A man who is absolutely, by natural necessity, forced, his will does not go along with the act; and therefore in the case of natural necessity, if a man is forced to commit acts of high treason, if it appears really force, and such as human nature could not be expected to resist, and the jury are of that opinion, the man is not then guilty of high treason."

³⁰² The conditions here laid down fall far short of the bald statement of the requests.

The defendant argues that if duress is a defense in treason, it should also apply in murder. There are differences, however, in the two high crimes which may well be taken account of. Treason is usually a continuing act from which there is a possibility of escape; and in *Respublica v. McCarty*, 2 Dall. 86, 1 L. ed. 300, a suggestion of escape is made as though it might nullify the intent. The mere fear of death, therefore, may well be allowed when a loyal intent may be shown by a possible speedy return to allegiance. But murder is a consummated act, irreparable after commission, and hence to be guarded against by a stricter rule, and such a rule has been applied in cases of murder.

Blackstone says, in 4 Blackstone's Commentaries, *30: "In time of war or rebellion, a man may be justified in doing many treasonable acts, by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. This, however, seems only, or at least principally, to hold as to positive crimes,

so created by the laws of society; and which, therefore, society may excuse; but not as to natural offenses so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore, though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant; for there the law of nature and self-defense, its primary canon, have made him his own protector."

In *United States v. Haskell*, 4 Wash. (C. C.) 402, Fed. Cas. No. 15,321, Washington, J., laid down the rule that the jury must find "a well-grounded cause to fear that death might be the consequence of their refusal to submit to Smith as the commander of the vessel. If they had not, they cannot excuse themselves in point of law by the allegation that they acted under the impulse of fear."

In *People v. Repke*, 103 Mich. 459, 61 N. W. 861, a threat, made three days before a murder, that the respondent would himself be killed if he did not go and assist was held to be no defense.

⁸⁰⁸ In *Leach v. State*, 99 Tenn. 584, 42 S. W. 195, a request to charge that if the defendant was forced, by fear of co-conspirators, to commit the murder, in order to save his own life, he would not be guilty of murder, was held to be properly refused. The court said: "He could not, with any degree of legal palliation, elect a course, absolutely safe to himself, and slay an innocent man, rather than take some risk to himself in an equal combat with a relentless companion."

In *State v. Fisher*, 23 Mont. 540, 59 Pac. 919, where one had threatened to take the life of the defendant if he refused to kill another, who was a mile away, and the defendant, believing that the threat would be executed, to save his own life, killed the man as directed, it was held to be deliberate murder.

In *Rizzolo v. Commonwealth*, 126 Pa. St. 54, 17 Atl. 520, instructions were sustained to the effect that while a man may take the life of his assailant for the purpose of preventing the infliction of grievous bodily harm upon himself, or for the purpose of preserving his own life, there is no principle of law which would justify or excuse him in taking the life of an innocent person to protect himself; also, that if he was coerced by fear of another, the jury should inquire whether his explanation

is such as would show that he had not the power to form the willful, deliberate, and premeditated intent to take the life of the victim.

The foregoing cases, all of which are cited by the defendant, sufficiently show that the requests were properly refused. They embraced no limitations such as appeared in the two cases most favorable to him. In *United States v. Haskell*, 4 Wash. C. C. 402, Fed. Cas. No. 15,321, a well-grounded fear was required to be shown, and in *People v. Repke*, 103 Mich. 459, 61 N. E. 459, the time between the threat and the killing was a controlling factor. The other cases cited are opposed to the defense of fear which is here set up.

In *Baxter v. People*, 8 Ill. 368, the court held that a subsequent aiding and abetting in robbery of the deceased, after the danger had passed away, made the defendant as guilty as if such danger had never threatened him.

It would be a most dangerous rule if a defendant could³⁰⁴ shield himself from crime by merely setting up a fear from the threat of a third person.

In *Regina v. Tyler*, 8 Car. & P. 616, Lord Denman said that fear "has never been received by the law as an excuse for his crime, and the law is that no man, from fear of consequences to himself has a right to make himself a party to committing mischief on mankind": See, also, *Queen v. Dudley*, 14 Q. B. D. 273.

The refusal of a request substantially like those before us, but describing a fear to the extent of taking away one's free agency, was sustained in *Arp v. State*, 97 Ala. 5, 38 Am. St. Rep. 137, 12 South. 301, 19 L. R. A. 357, upon a full review of authorities and reasons under the common law, because it ignored evidence of an opportunity to escape.

We think that the second and third requests were rightly refused.

The seventh request was: "If the jury believe that the defendant assisted in killing Ouloosian, but under threats against the defendant by Kasper, as shown by the evidence, then they are to find the defendant guilty of manslaughter." This request was refused.

We have already seen that the intentional killing of another, under threats, is held to be murder. The only ground upon which the request is urged—indeed, the only one upon which it can be urged—is that fear, like passion, may so cloud the mind as to eliminate malice. The comparison of the two elements of

action is not apt. One's own passion is not a defense to reduce a crime unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. Passion induced by a third person would be no defense to a homicide. So fear induced by one person is no defense to a defendant who kills another under its influence. This, of course, is a general rule, but it applies to this case. There might be cases, like a panic, where a general fear might not only reduce, but even excuse, an unlawful act, but such is not this case. If one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of ³⁰⁵ fear. Something more, at least, must appear than is shown in this request or in this case.

Upon a charge involving imprisonment for life we would not criticise too closely the terms of a request to charge, if a substantial defense appeared to which it might apply. The only ground of defense in this case is duress by reason of fear. Apart from its legal sufficiency, it appears to have no support in fact, and the facts are involved in the petition for a new trial on the ground that the verdict was against the evidence. A few of the salient facts show clearly that the defendant was not actuated solely by fear.

By his own statement he assisted in getting the deceased drunk. He followed when Nigohian took him to the barn agreed upon. He went into the barn voluntarily. He stated that Nigohian demanded that he should "help kill Peter"; thus showing that he did not then believe that he was dead. After entering the barn he had ample opportunity to escape, when Nigohian had hold of Peter and had no ax in his hands. He made no outcry, though dwelling-houses were near. The deceased was choked to death, and he admits that he assisted in the choking, but claims that Ouloosian was dead before he did it. Twenty finger-nail prints were found on Ouloosian's throat, all of which the doctors say, must have been made before death. The defendant said it took about twenty minutes before Peter was "out." He held the deceased by the throat while Nigohian cut off the money-belt and took from Ouloosian six hundred and twenty dollars in money. He did not leave the body until Kasper told him that Peter was "out"; a fact showing still further that he did not consider he was dead before. He took one-half of the money, three hundred and ten dollars, and, although he says that Nigohian put it into his pocket without

his knowledge, he kept it after he knew he had it, and while he was with Nigohian. After the murder he went with Nigohian to a saloon and drank with him, and then went home to bed. He gave no information to police authorities or others, after he separated from Nigohian until he was arrested. The defendant on the way from the barn threw the ax which Nigohian had into the river. In addition to all this the defendant made a full confession, in ³⁰⁸ the presence of several witnesses, after he was arrested. He was a second hand at the Rhode Island Locomotive Works, in charge of one hundred men, and not likely to be easily intimidated.

In view of these facts, and others which we need not refer to, the verdict was not against the evidence; nor does the case show any foundation for a defense by reason of fear, even if it could have availed.

Petition for a new trial denied.

COERCION AS A DEFENSE TO CRIME.

I. Character of the Offense.

- a. Crimes Other than Homicide, 721.
- b. Murder and Manslaughter, 722.

II. Nature and Extent of the Coercion.

- a. Extent of Coercion Generally, 723.
- b. Time and Place of Compulsion, 724.

III. Relation of the Parties.

- a. Husband and Wife.
 - 1. In General, 725.
 - 2. Effect of Modern Statutes, 726.
- b. Parent and Child, 727.
- c. Employer and Employé or Others Subject to Orders, 727.
- d. Commanding Officer and Soldier, 727.

I. Character of the Offense.

a. Crimes Other than Homicide.—It seems that the law will excuse a person, when acting under coercion or compulsion, for committing most, if not all, crimes, except taking the life of an innocent person. Thus, when one is compelled to join a mob and help break a threshing-machine, but runs away from the mob at his first opportunity, he may be acquitted of the offense: *Rex v. Crutchley*, 5 Car. & P. 133, 24 Com. Law Rep. 490. Probably the crime of robbery may be excused on the ground of coercion. In *Baxter v. People*, 8 Ill. 368, 383, it is said: "The tenth instruction asked is as follows: 'If the jury believe from the evidence that the defendant only consented to the robbery of the house of George Davenport, and not to his murder, and that the defendant at the time of giving such consent had reasonable cause to believe that his life would be immediately taken unless he gave such consent, then the law is, that the defendant is

not guilty.' This instruction was given with the very proper qualification, 'unless they further believe that he subsequently consented, advised, aided, abetted, or assisted in the robbery.' It hardly requires an argument to prove that if the prisoner, after the immediate danger had passed away (if any such ever existed), consented, advised, aided, abetted, or assisted in the robbery, that he was as guilty as if such danger had never threatened him."

In *Beale v. State*, 72 Ga. 200, it is held that a boy twelve years old who is coerced by fear of life or limb, cannot be an accomplice in burglary. And in *People v. Miller*, 66 Cal. 468, 6 Pac. 99, it is held that a boy of thirteen years is not an accomplice in the crime against nature, if he acted under threats and coercion. In both of these cases the question arose on the competency and sufficiency of the testimony of the boy against the principal offender, the boy not being on trial but his testimony being attacked as that of an accomplice: See, further, the extended note to *Stone v. State*, 98 Am. St. Rep. 160.

Even the crime of treason, if committed under the fear of death, may, it seems, be excused. In *Respublica v. McCarty*, 2 U. S. (2 Dall.) 86, 1 L. ed. 300, where the defendant was being tried for high treason, the court used this language: "In the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property." The supreme court of Rhode Island, in the principal case, appears to be of the opinion that coercion may constitute a defense to treason, but declines to extend so liberal a rule to the crime of murder.

b. **Murder and Manslaughter.**—The authorities seem to be conclusive, at the common law, that no man can excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person: See the principal case, ante, p. 715; *Arp v. State*, 97 Ala. 5, 38 Am. St. Rep. 137, 12 South. 301, 19 L. R. A. 357; *Rizzollo v. Commonwealth*, 126 Pa. St. 54, 17 Atl. 520; *Leach v. State*, 99 Tenn. 584, 42 S. W. 195; *Regina v. Tyler*, 8 Car. & P. 616, 34 Com. Law Rep. 923. In the recent case of *Brewer v. State* (Ark.), 78 S. W. 773, it is said: "The court refused to instruct the jury that, if the defendant shot Dortch under compulsion by third parties to save his own life, they should acquit; but, on the contrary, told them that, though one may lawfully kill an assailant if it be necessary to save his own life, he cannot lawfully slay an innocent third person, even to save his own life, but ought to die himself, rather than take the life of an innocent person. The question presented by the exception to this ruling has been discussed by text-writers more often than by the courts. But we feel very certain that unlawful compulsion of the kind set up as a defense in this case is not a sufficient justification for taking the life of an innocent person." As stated in

the principal case, fear induced by one person is, as a rule, no defense to a defendant who kills another under its influence.

The statutes of some of the states provide that coercion or compulsion may be a defense to or excuse for crime. And according to *Paris v. State*, 35 Tex. Cr. Rep. 82, 31 S. W. 855, it would seem that under such statutes coercion may successfully be urged as an excuse for taking the life of an innocent person. We do not interpret the case, however, as expressly so holding.

Perhaps in some cases coercion may be urged to reduce the grade of the homicide or to mitigate the punishment. There are intimations to this effect in the opinions of some of the courts: See the principal case, ante, p. 715; *Brewer v. State* (Ark.), 78 S. W. 773; but nowhere have we found an express holding that such is the law. In a number of cases, however, where the defense of coercion has been set up, the accused has been found guilty of murder in the first degree: See *Arp v. State*, 97 Ala. 5, 38 Am. St. Rep. 137, 12 South. 301, 19 L. R. A. 357; *Brewer v. State* (Ark.), 78 S. W. 773. In the principal case (ante, p. 715), it was contended that fear, like passion, may cloud the mind so as to eliminate malice. "The comparison of the two elements," said the court, "is not apt. One's own passion is not a defense to reduce a crime, unless it is caused by provocation, like a fight or a gross indignity, between the victim and the assailant. Passion induced by a third person is no defense to a homicide. So fear induced by one person is no defense to a defendant who kills another under its influence. This, of course, is a general rule, but it applies to this case. There might be cases, like a panic, where a general fear might not only reduce, but even excuse, an unlawful act, but such is not this case. If one has sufficient power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear."

In *Queen v. Dudley*, 14 Q. B. D. 273, shipwrecked men, who killed and ate one of their number to save their own lives from death by hunger, were found guilty of murder and sentenced to death, though their sentence was afterward commuted to six months' imprisonment. And in *United States v. Holmes*, 1 Wall. Jr. 1, Fed. Cas. No. 15,383, seamen were convicted of manslaughter for throwing some of the passengers overboard in order to save the boat.

II. Nature and Extent of the Coercion.

a. **Extent of Coercion Generally.**—The Georgia statute provides that to render threats or menaces available as an excuse for a person charged with crime, they must be threats or menaces which sufficiently show that his life or member was in danger, or that he had reasonable cause to believe, and did actually believe, that his life or member was in danger. This rule was applied to a perjury case in *McCoy v. State*, 78 Ga. 490, 3 S. E. 768, where the court remarked:

"No less degree of fear will excuse perjury than other felonies. He who swears falsely under the influence of fear excited by threats or menaces is not guiltless unless overcome by danger, or by reasonable apprehension of danger, to life or member. And it may well be doubted if the danger, or apparent danger, must not be a present impending one, not a mere remote contingency referable to an indefinite future. Why should a less urgent and pressing danger suffice for excusing perjury than for excusing larceny, arson, or homicide?"

On a trial for treason in *United States v. Vigol*, 2 Dall. 346, Fed. Cas. No. 16,621, where the defense of duress was set up, the court said: "The fear which the law recognizes as an excuse for the perpetration of an offense, must proceed from an immediate and actual danger, threatening the very life of the party. The apprehension of any loss of property by waste or fire, or even an apprehension of a slight or remote injury to the person, furnishes no excuse." And in *Respublica v. McCarty*, 2 U. S. (2 Dall.) 86, 1 L. ed. 300, another treason case, it is said: "In the eye of the law, nothing will excuse the act of joining an enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property." In *United States v. Fairclough*, 4 Wash. C. C. 402, Fed. Cas. No. 15,068, where the defendants were charged with running away with a vessel, it was stated that "the fear which could alone excuse them must be fear of death; such a fear as a man of ordinary fortitude and courage might justly yield to."

If fear induced by the threats of a third person can ever be urged as an excuse for taking the life of an innocent person, or in mitigation of the punishment therefor, it certainly cannot be so urged without taking account of the reasonableness of the fear and the opportunity for escape or for a successful defense: See the principal case, ante, p. 715; *Arp v. State*, 97 Ala. 5, 38 Am. St. Rep. 137, 12 South. 301, 19 L. R. A. 357.

b. **Time and Place of Compulsion.**—The statutes of Texas provide that a person forced by threats or actual violence to do an act, is not liable to punishment therefor, if the act is done while the person threatening is actually present. In construing this statute in a murder trial in *Paris v. State*, 35 Tex. Cr. Rep. 82, 31 S. W. 855, it is said in the course of the opinion: "While it is true that the literal language of the article in question requires the party duressing another to do an unlawful act to be actually present at the time, yet we apprehend that a proper construction of this section means only that the person shall be so near as to have the party with the means at his command under his power and control at the time he does the act; and a person twenty or thirty paces from the immediate place of the killing, armed with a pistol or shotgun, might have the person doing the act as much within his power and control

as if he was only a few feet distant from him when he performs the act.”

In *State v. Fisher*, 23 Mont. 540, 59 Pac. 919, where the defendant was convicted of murder in the first degree, it was insisted that there was evidence that the defendant was commanded to kill the deceased by one Calder, who threatened to take the life of the defendant if he refused; and that the defendant, believing that Calder would execute his threat, to save his own life, killed the deceased, who was, when slain, a mile distant from Calder and from the place where the threat was last made. But it was held that, if the evidence disclosed that the homicide was committed under such circumstances, then, at the common law and under the statutes of the state, the defendant was guilty of deliberate murder.

The impelling danger which can excuse a criminal act must be immediate: *United States v. Vigol*, 2 Dall. 346, Fed. Cas. No. 16,621; *Respublica v. McCarty*, 2 U. S. (2 Dill.) 86, 1 L. ed. 300. Threats of future injury cannot excuse an offense. Thus, in *People v. Repke*, 103 Mich. 459, 61 N. W. 861, where the accused was convicted of murder in the first degree, a threat to take his life, made three days before the homicide was committed, unless he aided in the killing, was held not to excuse him from liability for aiding and assisting in the murder. “A compulsion that could reduce or mitigate such a crime must have been more than a fear of future harm; it should appear that the danger of resisting such a force was immediate and impending”: *Brewer v. State* (Ark.), 78 S. W. 773.

A person on trial for perjury cannot defend on the ground that his false testimony was given under fear engendered by threats against his life before going into court: *Bain v. State*, 67 Miss. 557, 7 South. 408. “We can conceive,” said the court, “of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impelling danger, however, must be present, imminent, and impending, and not to be avoided.” To quote from *Burns v. State*, 89 Ga. 527, 5 S. E. 748: “The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. Thus, where the forbidden act is perjury by a witness at a coroner’s inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse.”

III. Relation of the Parties.

a. Husband and Wife.

1. In General.—The coercion of a wife by her husband, as an excuse for or a defense to her crimes, is discussed at considerable length in the note to *Bibb v. State*, 33 Am. St. Rep. 89-96. In the present consideration of this question, therefore, we shall confine our attention to the cases that have arisen subsequently to the writing

of that note. At the common law, if a married woman commits a crime, with the exception of treason, murder, and perhaps some other felonies, in the presence of her husband, she is presumed to have acted under his coercion, and is excused. This presumption, however, is *prima facie* only, and is rebuttable: *State v. Ma Foo*, 110 Mo. 7, 33 Am. St. Rep. 414, 19 S. W. 222. The presence of the husband, in order to raise the presumption of coercion, need not be actual. It seems to be sufficient if he is about the premises, even though in another room, if she is so near as to be fairly held under his control: *State v. Fertig*, 98 Iowa, 139, 67 N. W. 87; note to *Bibb v. State*, 33 Am. St. Rep. 95.

If a wife, at the instigation and request of her husband, procures a revolver and takes it to the jail where he is confined for the purpose of assisting him to escape, and he actively participates with her in conveying the weapon into the jail, it has been held that she is presumed to act under his direction and coercion, and is, therefore, entitled to an acquittal of any charge brought against her for the commission of such acts, unless the presumption is rebutted: *State v. Miller*, 162 Mo. 253, 85 Am. St. Rep. 498, 62 S. W. 692. But where a husband and wife keep a house of ill-fame in property used, occupied, and controlled by them both, she is not presumed to be acting under his coercion, and both are equally guilty: *State v. Jones*, 53 W. Va. 613, 45 S. E. 916. And the doctrine of presumed coercion from the marital relation does not apply, as already has been suggested, to the crime of murder: *Bibb v. State*, 94 Ala. 31, 33 Am. St. Rep. 88, 10 South. 506; *State v. Barnes*, 48 La. Ann. 460, 19 South. 251.

2. **Effect of Modern Statutes.**—In some jurisdictions the presumption of marital coercion in criminal cases has been abolished by statute: See the note to *Bibb v. State*, 33 Am. St. Rep. 93; *Brown v. Attorney General for New Zealand*, [1898] L. R. App. Cas. 234. "Whatever may have been the common law on the subject," to quote from *Bell v. State*, 92 Ga. 49, 18 S. E. 186, "it is evident from this language [of the code] that, as to any offense, however small, in order for the wife to stand excused under the code, on the ground of the presence of her husband, it must appear that she was in fact coerced, or that he used violent threats, command, or some equivalent means of coercion calculated to overpower her will and render her a passive instrument rather than a voluntary agent of crime." See, too, *Regina v. Baines*, 69 L. J. Q. B. 681, 82 L. T. 724, 64 J. P. 408, 19 Cox C. C. 524. The married women statutes, however, have been thought not to work any change in the legal presumption of marital coercion: See the note to *Bibb v. State*, 33 Am. St. Rep. 96; and where the presumption has been enacted into a positive statute, a subsequent act enlarging the general rights of married women has been held not to repeal such statute: *Neys v. Taylor*, 12 S. Dak. 488, 81 N. W. 901.

However, in *Smith v. Meyers*, 54 Neb. 1, 74 N. W. 277, where an instruction was requested that the law so far presumes a married woman to be under the control of her husband that, except for homicide and treason, she is conclusively presumed to act under his compulsion in committing a crime in his presence, and that therefore she cannot be subject to the penalties of perjury when testifying in his presence, the court said: "The general rule stated may have the sanction of age, and may have been justified by the social conditions of primitive times when we are told that the husband might moderately chastise his wife, the only issue in such case being the size of the stick employed for such purpose. We do not care to inquire what real sanction it finds in adjudicated cases—possibly no more than is found for the law of chastisement. Certain it is that such presumption runs counter to our broad laws as to the competency of witnesses, and counter to the reason of men in view of the domestic relations as they now exist, protected by more enlightened custom and a kindlier law. A wife is no longer a marionette, moved at will by the husband, either in fact or in law; and with the legal recognition of a separate and responsible existence, she must assume some of the burdens of life—among others that of testifying to the truth, under the customary penalties."

b. **Parent and Child.**—The command of a parent to a child will not justify a criminal act done in pursuance of it: *People v. Richmond*, 29 Cal. 414; *Rainey v. Commonwealth*, 19 Ky. Law Rep. 390, 40 S. W. 682. The California case involved the crime of grand larceny, the Kentucky case the crime of murder.

c. **Employer and Employé, or Others Subject to Orders.**—An agent or an employé cannot be excused for violating a criminal law, because the act was done in the course of his agency or employment, or in obedience to the employer's orders: *Reese v. State*, 73 Ala. 18; *Sarah v. State*, 18 Ark. 114; *Hately v. State*, 15 Ga. 346; *Commonwealth v. Hadley*, 11 Met. 66; *Kliffield v. State*, 5 Miss. (4 How.) 304; *Hays v. State*, 13 Mo. 246; *Allyn v. State*, 21 Neb. 593, 33 N. W. 212. One cannot justify or excuse obstructing a highway, on the ground that he acted in obedience to the orders of his superior officer, they being employes of a railroad company: *Sanders v. State* (Tex. Cr. App.), 26 S. W. 62. And the command of the master of a vessel cannot justify the mate in committing a crime, or in keeping the vessel in a course that endangers life: *State v. Sutton*, 10 R. I. 159.

d. **Commanding Officer and Soldier.**—Neither officers nor soldiers are bound to obey illegal orders of their superior officers: *State v. Sparks*, 27 Tex. 627. See, too, *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75; *Commonwealth v. Blodgett*, 12 Met. 56. "A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it

makes the party giving the order an accomplice in the crime": *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732. Thus, if a naval officer in command of a ship orders the sentry to run any man through the body who abuses the sentry, the order will not justify or excuse the sentry in committing a homicide under such circumstances: *United States v. Bevans*, Fed. Cas. No. 14,589. An English subject who, under the direction of the local Canadian authorities, commits a homicide in the United States in time of peace, may be prosecuted here therefor, though his sovereign affirms his conduct, and avows that the directions under which he acted were lawful acts of his government: *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328.

But while a soldier is not bound to obey an illegal order, and may be punishable if he does, he is bound to obey the legal directions of his superior officers; and is not liable to criminal punishment for his acts in so doing: *Clark v. State*, 37 Ga. 191; *Riggs v. State*, 3 Cold. 85, 91 Am. Dec. 272; *Commonwealth v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759, 55 Atl. 952. "The law is," to quote from *In re Fair*, 100 Fed. 149, 154, "that an order given by an officer to his private, which does not expressly and clearly show on its face its own illegality, the soldier is bound to obey, and such order is his full protection." Or, to quote from *United States v. Clark*, 31 Fed. 710, 717, "an order illegal in itself and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but an order given by an officer to his private which does not expressly and clearly show on its face or in the body thereof its own illegality, the soldier would be bound to obey, and such order would be a protection to him"; citing *Riggs v. State*, 3 Cold. 85, 91 Am. Dec. 272,

DOW v. NATIONAL ASSURANCE COMPANY.

[26 R. I. 379, 58 Atl. 999.]

INSURANCE—Goods Held on Installment Plan.—A policy of insurance on household furniture, which provides that it shall be void if the interest of the insured is other than the unconditional and sole ownership, is void as a whole, if a portion of the furniture is held by the insured on the installment plan. (p. 729.)

Thomas F. Farrell and Henry F. Thompson, for the plaintiff.

John A. Tillinghast and James E. Smith, for the defendant.

379 STINESS, C. J. The question raised in this case is the validity of the policy, which covered household furniture of

every description, in the house occupied by the plaintiff. The policy is the standard form, as provided in General Laws, caption 183, and contains a clause that the policy shall be void if the interest of the insured be other than unconditional and sole ownership, unless other ownership be assented to in writing. It is admitted that a considerable portion of the furniture was owned by others than the plaintiff, she holding it under what is called the installment plan.

The plaintiff claims the right to recover on what she owned herself, and had a verdict, under an instruction to that effect, to which the defendant takes exception.

The condition of the policy is plain, and the breach of it is admitted. Ownership is an important element in a contract of insurance. As said by Marshall, C. J., in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335: "Underwriters do not rely so much on the principles as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss."

Accordingly, when insurance is contracted upon property as a whole, it is no answer to say that the insured owned a part ~~380~~ of it. A new element would be introduced into the contract. We cannot say that the contract would have been made as it was, or even at all, if the fact had been known that only a small part of the property belonged to the plaintiff. Such a fact is deemed to be so important that it is no longer merely a provision of contract, but of statute, for the statute prescribes the clause in question. The terms of it apply to the policy as a whole. The policy is made void; not void simply as to the part of the property in which there may not be absolute ownership and valid as to the rest. We see no room for such a construction of the terms of the policy.

In *Westchester v. Weaver*, 70 Md. 536, 18 Atl. 1034, 5 L. R. A. 478, where one point raised in the case involved the ownership of a piano, which the assured held under an installment agreement, with condition to pay the full value in case of destruction by fire, a stronger case than this, the court said: "The terms of the policy required him [the insured] to be the unconditional owner at the time of the insurance, and this, it appears, he was not."

The question was not raised in that case whether the policy was void as a whole, but the following cases are to the effect that a false statement as to the ownership of a part avoids the policy:

Cuthbertson v. North Carolina Ins. Co., 96 N. C. 480, 2 S. E. 258; East Texas Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Ehram Machine Co. v. Phoenix Co., 43 Neb. 554, 61 N. W. 722; Home Ins. Co. v. Smith (Tex. Civ. App.), 29 S. W. 264; Waller v. Northern Co., 10 Fed. 232; Mullin v. Vermont Co., 54 Vt. 223; Mount Leonard Milling Co. v. Liverpool etc. Ins. Co., 25 Mo. App. 259; Catron v. Tennessee Co., 25 Tenn. (6 Humph.) 176.

We are of opinion that the refusal to charge that the policy was void was error, and as this is conclusive of the plaintiff's right to recover, the case is remitted to the common pleas division with direction to enter judgment for the defendant.

Where the Validity of Insurance is made to depend upon the insured being the absolute and unconditional owner of the property insured, it has been held that his failure to set forth the true title renders the policy void not only as to the property, the title to which is not truly represented, but as to all the property covered by the policy: Geiss v. Franklin Ins. Co., 123 Ind. 172, 18 Am. St. Rep. 324. See, too, Germania Fire Ins. Co. v. Schild, 69 Ohio St. 136, 100 Am. St. Rep. 663.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

HAYS v. WESTERN UNION TELEGRAPH COMPANY.

[70 S. C. 16, 48 S. E. 608.]

TELEGRAPH COMPANY—Mistake in Quoting Prices.—If a telegraph company, in transmitting a message, changes the market price of mules as stated therein, and quotes them at a lower figure, thereby inducing the sendee to direct the purchase of a number of mules, the measure of damages is the difference between the price paid, and the price stated in the telegram as delivered. (pp. 734, 735.)

TELEGRAPH COMPANY—Time to Present Claim.—Waiver is a voluntary relinquishment of a known right, and does not require a new contract upon consideration to be effectual against a stipulation in a contract for the transmission of a telegram that claims for damages must be presented within sixty days. (p. 735.)

TELEGRAPH COMPANY—Waiver by Local Agent.—A local telegraph operator to whom the company intrusts the duty and responsibility of getting up all possible information in case a claim is made against it for damages, has authority to waive a condition that such claims must be presented within sixty days. (pp. 735, 736.)

TELEGRAPH COMPANY—Time to Present Claim—Waiver. If a telegraph company, long after receiving a verbal claim for damages and eight or ten days after receiving such claim in writing, seeks further information as to the merits of the claim, it thereby waives its right to rely on a stipulation that claims must be presented in writing and within a specified time. (p. 737.)

Evans & Finley, for the appellant.

Sheppards & Grier, for the respondent.

¹⁷ WOODS, J. The plaintiffs, R. M. Hays & Brother, were dealers in horses and mules at Greenwood, South Carolina. A. C. Hays, the junior partner, was sent to the St. Louis stock market with the understanding that he should purchase only after he had telegraphed prices and received instructions from his senior, R.

M. Hays. On January 1, 1901, A. C. Hays delivered to the defendant, Western Union Telegraph Company, in St. Louis, for transmission to R. M. Hays at Greenwood a telegram in these words: "Fourteen half hands, ninety-five; fifteen hands, one hundred and five; fifteen half hands, one hundred seventeen fifty; pair for self, sixteen hands, two sixty; all little less quality than before." As delivered to R. M. Hays the telegram read "one hundred and seven fifty," instead of "one hundred and seventeen fifty," as written; and R. M. Hays was thus led to believe that mules fifteen and one-half hands high could be bought for one hundred and seven dollars and fifty cents instead of one hundred and seventeen dollars and fifty cents. Acting on this impression, he telegraphed his partner to buy twenty-four mules of that size. R. M. Hays testified he was induced by the price to purchase mules of fifteen and a half hands, instead of the cheaper mules of fifteen hands, and that he could have sold in Greenwood the cheaper mules at about the same price, the market price there for the two classes of mules being about ¹⁸ the same. The plaintiffs claimed of the defendant damages of ten dollars for each of the twenty-four mules purchased, being the difference between the price stated in the telegram as delivered and the price actually paid.

In sending the messages, plaintiffs agreed to the printed contract: "That the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The claim was not presented in writing until more than sixty days had elapsed.

The defendant moved for a nonsuit, first, because there was no proof of any direct loss to the plaintiffs arising from the mistake of transmitting the telegram, but only of loss of profits; and second, because plaintiffs did not present claim in writing within sixty days after the filing of the message for transmission, as stipulated in his agreement. The refusal of the motion for a nonsuit is made the first ground of appeal.

In *Howard v. Stilwell etc. Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. Rep. 500, 35 L. ed. 147, the supreme court of the United States, after stating the rule that contingent or remote profits are not recoverable, says: "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remote-

ness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." The general doctrine is well expressed in *Griffin v. Colver*, 69 Am. Dec. 718: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed ¹⁹ to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed": See, also, *Jenkins v. Charleston etc. Ry. Co.*, 58 S. C. 373, 36 S. E. 703. The principle thus clearly stated is generally recognized, but there is often great difficulty in its application. In the case now under consideration, the telegram which defendant undertook to transmit indicated on its face the purpose to give information of the price of livestock by size, for the word "hands," as a term of measurement, is not usually applied otherwise. Such a message also gives notice that it will be used as a basis of business action or nonaction, and that loss or profit is liable to result. Indeed, the sole purpose of such telegrams is obviously to make profit by purchase and sale, and this purpose was within the understanding of the plaintiffs and the telegraph company when it undertook to deliver the message. Accordingly the rule as to telegraph companies is thus stated in 27 American and English Encyclopedia of Law, 1069: "When a message announcing prices, sent in contemplation of a trade, is erroneously transmitted, the party injured through acting upon the erroneous message may recover the amount of his actual loss caused by the decrease in the price he obtained, or, in case he is a purchaser, the increase in price he is obliged to pay in consequence of the error": *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4.

These views are not inconsistent with *Sitton v. McDonald*, 25 S. C. 68, 60 Am. Rep. 484, where the profits claimed were not in the contemplation of the parties; nor with *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67, where the special damages were held not sufficiently alleged; nor with cases like *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577, 31 L. ed. 479, where there was failure to deliver the tele-

gram, and hence no purchase based thereon, leaving it entirely conjectural whether the plaintiff would have purchased if the telegram ²⁰ had been delivered, and would have subsequently sold on the rising market.

Here there was evidence of an actual purchase on the faith of the telegram, and an actual loss of a profit which would have been made if the telegram had been correctly transmitted.

In *Wallingford v. Western Union Tel. Co.*, 53 S. C. 410, 31 S. E. 275, the facts were entirely different, and that case is applicable only by analogy. There the defendant demurred to a complaint for damages, which alleged sale of a carload of mules would have been directed by one partner in answer to a telegram from another stating offer of purchase, if the telegram had been delivered; whereas, by reason of the failure to deliver the telegram, the firm was forced to hold the mules for some time at considerable expense, and then to sell for less than the price mentioned in the telegram. The mules were at Sheridan, Indiana, and the undelivered telegram related to an offer in that market. The court said: "The measure of damages in such a case as this is the difference between the market value of such mules on the same terms at the time the message should have been delivered, and the price offered, in case such market value was less than the price offered. By market value is meant the price that could have been obtained in open market on fair competition on similar terms at Sheridan, Indiana, or if there was no market price there, at any convenient market for mules, where there was at the time a market price." It is not necessary that the plaintiff should bring home to the defendant knowledge of the market conditions. In the case now under consideration, the market price of the mules in St. Louis, given in the telegram as delivered, was ten dollars less for each mule than the actual market price in St. Louis which plaintiffs had to pay. There was evidence to the effect that plaintiffs would not have bought the mules they did buy if the telegram had been correctly transmitted, but would have bought the smaller mules at a price ten dollars lower for each, which would have answered the same purpose in the conduct ²¹ of the plaintiffs' business, as they were worth in the Greenwood market, where they were to be sold, as much as the larger mules. This means that the plaintiffs paid out two hundred and forty dollars on the faith of the telegram, and that they derived no substantial profit or advantage from the payment of this sum. Therefore, whether we regard the effect on the plaintiffs as a loss of profit, or the

fruitless expenditure of money on the faith of the telegram, the result is the same. The difference in the price paid and the price stated in the telegram as delivered was, under the facts of this case, the true measure of damages.

The nonsuit could not have been granted on the second ground because the plaintiffs had the right to prove in reply waiver or estoppel as to the stipulation that the claim should be presented in writing within sixty days: *Copeland v. Western Assur. Co.*, 43 S. C. 26, 20 S. E. 764.

The charge of the circuit judge on the subject of profits was in accordance with the views above expressed in considering the motion for nonsuit, and was, therefore, not erroneous.

The circuit judge refused the motion to direct a verdict made on the ground that it was affirmatively proved that the claim had not been presented in writing within sixty days, and that there was no evidence of waiver. The jury were instructed that the contract requiring the claim to be presented in writing within sixty days was valid, and they were left to decide whether there was sufficient evidence of waiver of the stipulation. The question is, whether there was any evidence of waiver, for if there was no such evidence the jury should have been instructed to find for the defendant.

Waiver is a voluntary relinquishment of a known right, and it does not require a new contract upon consideration to be effectual against the stipulation that the claim should be presented within sixty days: *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762.

The transactions relied on as constituting waiver were ²² altogether between the plaintiffs and Calhoun, the agent of the defendant at Greenwood, and hence it is necessary to determine how far the defendant should be bound by his course of conduct. A mere local telegraph operator whose duty is confined to the receipt, delivery and transmission of messages, cannot bind his principal by waiving its rights as to claims presented against it: *Railway Co. v. Brown* (Tex. Civ. App.), 24 S. W. 918; 13 Am. & Eng. Ency. of Law, 392; 4 Elliott on Railroads, sec. 1524. This is in accord with analogous cases in this state: *Petrie v. Railway Co.*, 27 S. C. 63, 2 S. E. 837; *Garrick v. Railroad Co.*, 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 334. In this case, Calhoun describes himself as "manager of the Western Union Telegraph Company at Greenwood." While too much importance should not be attached to an official designation, he testifies to the important fact that the company intrusted to him the

duty and responsibility of getting up all possible information in such cases. After this claim was presented in writing, the company corresponded with him about it, but gave no special instructions to obtain further information. This correspondence furnished ample opportunity for the company to notify him not to exercise his usual duty of obtaining additional information from the plaintiffs. In the absence of such instructions, Calhoun was fully justified in acting on his general authority to seek information as to the merits of the claim as agent of the company, and defendant will be chargeable with the result of his action in that regard.

Waiver of contracts of forfeiture similar to this have been placed on several different grounds: 1. If some statement or proof has been furnished indicating the nature and grounds of the claim within the time prescribed, good faith requires notice of the defect relied on, so that it may be remedied in time, and failure to give such notice is waiver of the defect: *McBryde v. South Carolina etc. Ins. Co.*, 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73, 21 Am. St. Rep. 904, 20 Atl. 838; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, 20 S. E. 670. 2. The party to be charged waives²³ the forfeiture if, with knowledge of all the facts, he requires the claimant to do some act or incur some trouble or expense inconsistent with the position that the contract had become inoperative in consequence of the breach of its conditions: *Madsden v. Phoenix Fire Ins. Co.*, 1 S. C. 24; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 603, 32 S. E. 762; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 37 Am. St. Rep. 529, 22 L. R. A. 432, 35 N. E. 316; *Hudson v. Northern Pac. Ry. Co.*, 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608. In this proposition there is also the element of estoppel, and it is applicable to all contracts for forfeiture. 3. Where the statement or proof is presented after the time limited by the contract, and the claimant thereafter does nothing, and incurs no expense or trouble in consequence of any demand of the party to be charged, yet waiver of the form of the claim and of the time limit will be implied, if the statement or proof is retained and considered on its merits without notice that the time limit, or a lack of written demand in proper form, will be relied on: *McBryde v. South Carolina etc. Ins. Co.*, 55 S. C. 593, 74 Am. St. Rep. 769, 33 S. E. 729; *Western Union Tel. Co. v. Strate-meier*, 6 Ind. App. 125, 32 N. E. 871; *Illinois Cent. R. R. Co. v. Bogard*, 78 Miss. 11, 27 South. 879; *Wabash R. R. Co. v.*

Brown, 152 Ill. 484, 39 N. E. 273; Commercial Assur. Co. v. Hocking, 115 Pa. St. 407, 2 Am. St. Rep. 562, 8 Atl. 589.

It is to be borne in mind that stipulations as to the form of such claims and the time within which they shall be presented do not relate to the merits. They do not affect the consideration or condition upon which liability or risk is assumed, nor are they contracts of exemption from particular risks or liabilities. These things, the consideration, the exemption from liability, and the conditions of liability, form the very basis of the contract and are of its substance, and it is not reasonable to suppose known rights as to them will be lightly relinquished. Therefore, in many such cases waiver is based on the fact that the claimant has changed his position as a result of the conduct of the party to be charged. In this view, it was held in *Joye v. South Carolina etc. Ins. Co.*, 54 S. C. 375, 32 S. E. 446, that the promise of the president of an ²⁴ insurance company to pay the loss did not constitute waiver, as it was followed by another letter, denying liability because the consideration of the policy had not been paid, no change in the condition of the insured having taken place in the meantime. On the contrary, provisions as to the form of claims and the time of presentation are intended only to secure the orderly conduct of the business of the company by giving it an opportunity to investigate while the facts may be ascertained, and hence any indication given to the claimant of its election to consider the claim on its merits will be regarded evidence of waiver.

There was evidence here that before the expiration of sixty days the plaintiffs notified defendant's agent and manager at Greenwood of the loss, and that they would hold the company liable unless it should turn out that Calhoun, the Greenwood agent, had made a mistake. In these circumstances, long after the verbal notice, and when the telegraph company had had the written claim in hand eight or ten days, Calhoun, on behalf of the company, sought of the plaintiffs further information about the merits of the claim. The evidence does not disclose any expression of intention to claim the time limit during these negotiations or at any time until the answer was filed. The failure of the defendant to object that the first notice was not in writing, its subsequent receipt and retention of the written claim without objection after the time had expired, and the request for further information as to the merits while it had the written claim in hand, taken together, furnished evidence of waiver sufficient to go to the jury.

Under the views above expressed as to the scope of the duties and responsibilities imposed by defendant on Calhoun, its Greenwood agent, it was manifestly competent for the plaintiffs to prove the notice and presentation to him of the claim, and his demand for information concerning it.

The judgment of this court is that the judgment of the circuit court be affirmed.

Mr. Justice Gary Dissented and said in part: "There was no testimony that the defendant had notice of the fact that the first message related to the purchase of mules, nor that the mules were purchased for resale, nor as to the market value of the mules at the time the plaintiffs' right of action accrued. His honor, the presiding judge, erred in the test for the admeasurement of damages which he submitted to the jury, for the reason that profits were not a proper element of damages in this case. In the leading case of *Hadley v. Baxendale*, 9 Ex. 341, the following general rules are indicated: '1. That damages which may fairly and reasonably be considered as naturally arising from a breach of contract according to the usual course of things, are recoverable; 2. That damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract': Cited with approval in *Sitton v. McDonald*, 25 S. C. 68, 60 Am. Rep. 484.

"In the earlier cases, both English and American, there was a general concurrence in excluding profits in actions of tort as well as on contract, which merely might have been realized had the injury not been done or the contract been performed: 8 Ency. of Law, 617. 'Profits which depend upon the fluctuations of the markets and the hazards and chances of business, are considered too contingent and speculative to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate of damages; for, besides the uncertain and contingent issue of such an operation in itself, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting': 8 Ency. of Law, 618, 619.

"In the case of *Western Union Tel. Co. v. Nye etc. Grain Co.* (Neb.), 64 L. R. A. 803, 97 N. W. 305, it was held that 'where the negligent delay of a telegraph company in the delivery of a message delivered to it for transmission by the plaintiff, results in the loss to the plaintiff of a sale of a quantity of corn at a price above the market value of the corn at the time and place it would have been delivered had such sale been made, the measure of damages is

the difference in value between the price the plaintiff would have received for the corn had the sale been made and the market value of the corn at such time and place of delivery, unaffected by the price at which the plaintiff may have disposed of the corn after that time.' In discussing the question of profits, the court uses this language: 'In such cases the general rule is that, so far as it can be done by money, the injured party is to be placed in the same situation in which a performance of the contract would have placed him. But it would be impossible to follow the labyrinth of remote results and consequences of a breach of contract and determine either the ultimate situation of the party as affected thereby, or what such situation would have been had the contract been performed. The law, therefore, takes into account only proximate results, and disregards such as are remote, or are the product of intervening or independent causes. Hence the situation of the injured party which forms the basis of the comparison must be his situation when the breach of contract occurred, and before remote or independent causes had intervened to change it. His situation after that time can never be material as an ultimate fact in the case, because after the intervention of such causes it can never be known, with any reasonable degree of certainty, to what extent it is due to causes only remotely connected with the breach of contract or wholly independent of it.'

"Whatever may be the rule elsewhere, the courts of this state have followed the earlier decisions, both English and American, which held that anticipated profits could not be recovered, for the reason that they were indefinite, uncertain and too remote. In the case of *Sitton v. McDonald*, 25 S. C. 68, 60 Am. Rep. 484, the plaintiff carried on the business of buying old cotton-ties and manufacturing them into new ones. In the operation of its machinery it used a peculiar kind of punch which could not be repaired by a blacksmith. The plaintiff carried it to the defendant, who undertook to repair it. The defendant failed to carry out its contract, and the plaintiff brought an action for one thousand dollars damages. Upon the trial the plaintiff offered to prove as damages the amount of profits he would have earned in the ordinary employment of the punch during the time it was detained by the defendant. The defendant objected to the testimony on the ground that such damages were too speculative, remote and contingent. The objection was sustained. The court said: 'We are aware that there are circumstances under which one who, by breach of contract, has delayed a sale until there is a fall in the marketable value of the property, may be charged as damages with the difference in price; but we do not see that such principle applies to a case where the only question is as to more or less profits, which as a whole as profits are excluded as too contingent, remote and speculative.' In commenting on the case of *D'Orval v. Hunt*, Dud. 180, the court uses this language: 'In this

latter well-considered case, it was held that "for the breach of an executory contract, without fraud or imposition, the jury can only give such damages as fairly and naturally result from it and which can be measured by a pecuniary standard; remote and consequential damages cannot be allowed." "

"We desire to call special attention to the fact that profits were excluded in the case of *Sitton v. McDonald*, 25 S. C. 68, 60 Am. Rep. 484, on the ground that they were too contingent, remote and speculative. Are anticipated profits in the case under consideration less contingent, remote and speculative than in the case just mentioned? They are in their very nature problematical, conjectural, uncertain, indefinite, speculative and remote. They are dependent upon many contingencies—fluctuations in the market, caprice of purchasers, value of services employed in selling the articles, interest on capital invested, and various other circumstances that cannot be contemplated with any degree of certainty.

"The rule for the admeasurement of damages is correctly set forth in *Wallingford v. Western Union Tel. Co.*, 53 S. C. 410, 31 S. E. 275. In that case the plaintiff brought an action for damages on account of the failure on the part of the telegraph company to deliver seasonably a message whereby the plaintiffs lost the sale of a lot of mules. Mr. Justice Jones thus states the principle in the admeasurement of damages: 'The measure of damages in such case as this is the difference in the market value of such mules on same terms, at the time the message should have been delivered and the price offered, in case such market value was less than the price offered.'

"It certainly cannot be successfully contended that the plaintiffs are entitled not only to profits but likewise to the difference in the amount paid for the mules and their market value at the time their cause of action accrued. The law does not allow both measures of damages in one case. We, therefore, conclude that either the rule for the admeasurement of damages laid down in *Wallingford v. Western Union Tel. Co.*, 53 S. C. 410, 31 S. E. 275, is erroneous, or the principle announced in the opinion of Mr. Justice Woods is wrong. The rule stated in *Wallingford v. Western Union Tel. Co.*, 53 S. C. 410, 31 S. E. 275, should, for a stronger reason, be applied in this case, because the error in transmitting the telegram did not prevent the plaintiffs from becoming the purchasers of the mules, nor deprive them of the opportunity of making whatever profit they saw fit by a resale of the mules. The direct and proximate result of the error in sending the message was to cause the plaintiffs to purchase the mules, for which they had to pay a larger sum than they contemplated as the purchase money thereof, and the measure of their damages was the difference in the market value of the mules at the time their right of action accrued, and the amount they were compelled to pay by reason of said error. This mode of admeasuring

damages is more certain than determining the amount of anticipated profits supposed to have been lost by the error. In 8 Encyclopedia of Law, 611, it is said: 'Where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain.'

"The quotation which Mr. Justice Woods makes from 27 Encyclopedia of Law, 1069, shows that when the person affected by an error in the transmission of a message is the purchaser, he is entitled to recover the increase in price which he is obliged to pay in consequence of the error, but it does not sustain the doctrine that the purchaser has the right to recover lost profits."

The Measure of Damages against a telegraph company, where it makes a mistake in quoting prices, is discussed in *Pepper v. Telegraph Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609; *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 88 Am. St. Rep. 36; monographic note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 779-782. It has been held that if a telegraph company is negligent in failing to deliver a telegram giving the addressee an opportunity to make a contract, the loss of profits which he might have made if he had entered into the contract is too remote and uncertain to be recovered: *Johnson v. Western Union Tel. Co.*, 79 Miss. 58, 89 Am. St. Rep. 584.

EX PARTE STOCKMAN.

[70 S. C. 31, 48 S. E. 736.]

BANKS—Suspension of Payment—Demand.—When a bank suspends payment, it thereby expresses its inability and refusal to pay depositor's checks. (p. 742.)

BANKS—Interest After Suspension of Payment.—A general depositor is entitled to seven per cent interest from the date of suspension of payment by a bank, as damages for breach of contract to pay his checks on presentation, although he does not actually present checks demanding payment, and although special deposits may draw a lower rate. (p. 742.)

Sheppards & Grier, for the appellant.

Caldwell & Park, for the respondent.

³¹ WOODS, J. The City Bank of Greenwood, on May 20, 1903, closed its doors and ceased to do business. ³² A few days afterward a receiver was appointed, who has administered the assets under the order of the court of common pleas, and paid the general depositors in full the amounts due them, but with-

out interest. The circuit court subsequently on the petition filed by Andrew C. Stockman, in behalf of himself and other depositors, ordered the receiver to pay interest on the general deposits at the rate of seven per cent per annum, from May 20, 1903, the date of the bank's suspension. From this order the receiver appeals, alleging error in allowing interest without actual demand for payment, and insisting, further, that even if interest is allowed, it should be only at the lower rate which it was the custom of the bank to contract to pay on certificates issued for time deposits.

The general depositors did not after the suspension actually present checks demanding payment, but in some instances did ask if the checks would be paid, and were informed they would not be. It is admitted no check would have been paid by the bank after suspension.

The debt of a bank to a general depositor is payable on demand, the demand being usually in the form of a check. In the absence of express agreement there is no interest on deposit accounts until demand and refusal. When, however, a bank permanently closes its doors—suspends payment—it expresses its inability and its refusal to pay depositors' checks. This is the recognized business method of indicating the futility of actually presenting the check or making demand in any other way for payment. When the bank thus expresses its refusal to pay any depositor, it would be useless to require each depositor to have the refusal repeated to him. The depositor is, therefore, entitled to interest from the date of suspension as damages for breach of the contract to pay his checks on presentation: *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864; *Thurston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382; *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852; 5 Cyc. 569.

The general deposits after suspension being sums of ³³ money ascertained and due, seven per cent is the rate of interest prescribed by statute. The lower rate paid special depositors by contract cannot affect the right of a depositor who did not choose to make such a contract.

The judgment of this court is that the judgment of the circuit court be affirmed.

Deposits of Money in a Bank, subject to check, become due without demand if the bank becomes insolvent: *Thompson v. Union Trust Co.*, 130 Mich. 508, 97 Am. St. Rep. 494; *Colton v. Drovers' etc. Loan Assn.*, 90 Md. 85, 78 Am. St. Rep. 432.

DIVINE v. MILLER.

[70 S. C. 225, 49 S. E. 479.]

LIMITATION OF ACTIONS—Payment After Death of Obligor.—Where the maker of a note assigns to the payee a mortgage as collateral, and instructs him to foreclose it and apply the proceeds on the note, an application of such proceeds to the payment of the note after the death of the maker does not stop the running of the statute of limitations on the note. (p. 744.)

LIMITATION OF ACTIONS—New Promise by Administrator.—The promise of an administrator to pay the note of his decedent before the bar of the statute of limitations is complete, may renew the debt against the personal estate, but it does not bind the heirs, other than himself, so as to affect their interest in the real estate. (p. 744.)

Clark, Elliott & Clark, for the appellants.

Barron & Ray, for the respondent.

226 WOODS, J. On August 11, 1894, Dr. E. Miller **227** gave to John F. Divine his promissory note for sixteen hundred and seventy-six dollars and two cents, payable one day after date. Miller died intestate on February 17, 1897, and thereafter on September 16, 1901, the plaintiff filed his complaint against the administrators of Miller's estate and his heirs at law, setting out his own note, alleging that there were other debts outstanding against the estate, and that the entire personal estate had been assigned to the widow as a homestead, and asking that the assets be marshaled, the claims established and the real estate sold for their satisfaction. The defendants in their answer admit that there is no personal estate in the hands of the administrators, and set up as a defense the statute of limitations. The circuit judge held that this defense could not avail because of a payment made on the note and the written promises made by C. D. Miller, one of the administrators, before the expiration of the statutory period. The appeal turns on the correctness of this ruling.

The payment relied on was made under these circumstances: Dr. E. Miller, the intestate, assigned to the plaintiff a bond and mortgage of Mrs. Beulah M. Watson as collateral to his note. Believing that Watson might set up defenses against him which would not avail against Divine, the assignee, Miller requested Divine to foreclose in his name the Watson mortgage and apply the proceeds on his own note as payment. After full conference with Miller, J. T. Barron, Esq., Divine's attorney, commenced

the foreclosure litigation, and conducted it against Mrs. Watson, under the direction of Miller, up to the time of his death. After the death of E. Miller, C. D. Miller, one of the administrators of his estate, who was also his son, corresponded with Mr. Barron on the subject, and in his letters promised in the most explicit manner that the estate would pay the balance of the debt to Divine after the application of the proceeds of the sale of the Watson land. This was in 1898, less than six years from the maturity of the Miller note.

If the suit on the Watson collateral mortgage had continued ²²⁸ under Dr. E. Miller's direction to its termination and the proceeds of the sale had been applied to his note, under his express instructions, then the payment would have been his payment and would have arrested the currency of the statute: *Hopper v. Hopper*, 61 S. C. 124, 39 S. E. 366. Under the arrangement with Miller, Divine was not merely the holder of a collateral, but he was the agent of Miller, acting under his express direction in the conduct of the suit, and the collection of the money. But Dr. Miller having died before the sale of the Watson land, from which the payment was realized, the payment cannot be attributed to him as his act. His death did not affect Divine's interest in the collateral and his right to collect it, but it ended the special agency and the control of Miller over the litigation and the proceeds of the sale. To be effective in arresting the statute, the payment must have been made in the name of Miller and by his agent, as if he himself were making it. After his death this was impossible: *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606; *Hunt v. Rousmanier's Admrs.*, 8 Wheat. 205, 5 L. ed. 589.

The promises made by the administrator, C. D. Miller, before the bar of the statute was complete, are sufficient to defeat the plea of the statute interposed by him: *Reigne v. Executor of Desportes*, Dud. 118; *Johnson v. Ballard*, 11 Rich. 178. But such a promise made as administrator does not bind the heir or affect his right to the protection of the statute as to real estate descended to him: *Gibson v. Lowndes*, 28 S. C. 301, 5 S. E. 727. On the other hand, a promise made by the heir alone, to which the administrator is not a party, will not bind the estate: *Bolt v. Dawkins*, 16 S. C. 211. In this case, therefore, the promise of Charles D. Miller, the administrator, could not bind the heirs other than himself so as to affect their interest in the real estate. For while his letters indicate that he regarded himself as representing the interests and wishes of the family, there

is no proof of his authority to act for the others as to the real property. But in making promises to pay, and in all his efforts to secure indulgence, as the ²²⁸ letters clearly show, he treated with the plaintiff in the dual capacity of administrator and heir. By these promises as administrator he renewed the debt against the estate as to the personalty, and as heir against the real estate to the extent of the interest he inherited, and the statute of limitations cannot avail him. When the facts of the case of Gibson v. Lowndes, 28 S. C. 301, 5 S. E. 727, are considered, it will not be found to conflict with this view. It is true, the payments in that case were alleged to have been made by Mrs. Lowndes, who was a devisee and also named in the will as executrix, but she had not qualified as executrix, and, therefore, was not the personal representative of the testator. In this case, when the promises were made the debt was not barred. C. D. Miller was an heir and also administrator, and, as we have seen, when he promised to see the debt paid, he was acting in both capacities. It will hardly be contended that a debt cannot be renewed at all by a new promise, so as to defeat the plea of the statute of limitations interposed to protect the real estate of the intestate. Surely, if it can be done at all, it can be done by one who is both heir and administrator. The real estate of the intestate, E. Miller, is, therefore, liable for the plaintiff's debt to the extent of the interest of C. D. Miller, but no further.

As the action is on behalf of the plaintiff and "all other creditors of E. Miller who may come in and seek relief by and contribute to the expenses of this action," and no other creditors have proved their demands, we express no opinion as to their rights.

The judgment of this court is that the judgment of the circuit court be modified as herein indicated.

New Promises and Acknowledgments to suspend the running or remove the bar of the statute of limitations are discussed in the monographic note to Warren v. Cleveland, 102 Am. St. Rep. 755-777. Neither a payment, an acknowledgment, nor a promise in writing will take a case out of the bar of the statute, unless made by the person to be charged thereby or an agent authorized for that purpose: Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17; Walford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315. The renewal of debts against the estate of a decedent by his administrator is discussed in the monographic notes to Schlicker v. Hemenway, 52 Am. St. Rep. 123-128; Fletcher v. American Trust etc. Co., 78 Am. St. Rep. 188-190; and the subsequent case of Holly v. Gibbons, 176 N. Y. 520, 92 Am. St. Rep. 694.

DENNIS v. ATLANTIC COAST LINE RAILROAD CO.

[70 S. C. 254, 49 S. E. 869.]

DEATH—Construction of Statutes Giving Action for.—The North Carolina act of 1897, giving to railroad employes and their representatives a remedy for injuries or death caused by defects in appliance, or the negligence of fellow-servants, is intended merely to enlarge the Lord Campbell act of that state, and the two should be construed together. (pp. 747, 748.)

DEATH—Action for Causing—Conflict of Laws.—When a liability for causing the death of a person is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act in any degree is subject to the *lex fori*, with regard either to its quality or its consequences. (p. 748.)

DEATH—Action for Causing—Conflict of Laws.—An action in South Carolina for a wrongful death occasioned in North Carolina is encumbered with all the burdens arising out of the statutes of the latter state, which create the right of action. (p. 749.)

DEATH—Limitation of Action for—Conflict of Laws.—The requirement of the statutes of North Carolina that an action for wrongful death must be brought within one year, is not a statute of limitations; a failure to commence an action in that state within that time extinguishes not only the remedy, but the right, so that thereafter an action cannot be maintained in South Carolina. (p. 749.)

W. F. Clayton, for the appellant.

Willcox & Willcox, for the respondent.

255 GARY, J. Frank McGowan, a resident of South Carolina, was an engineer in the employment of the defendant, and was killed in North Carolina by the wreck of **256** an engine he was running, on the 10th of November, 1900, more than one year before this action was commenced by his administratrix. It is alleged that the death of the intestate was caused by defects in the machinery and appliances he was operating, and that the defendant had notice of such defects.

An agreement between counsel is set out in the record, in which appears the following statements: "The issue is as to whether the plaintiff was barred of her right of action in this state, it being admitted that under the Lord Campbell act of North Carolina, the action must be brought within one year, while in the state of South Carolina the limitation was two years, and that this action was brought after the lapse of one year and within two years, the object being to bring all matters before this court on this one appeal and to save several appeals." The reason for the agreement was, because this question would not otherwise at this time have been properly before the court.

The appellant contends that her action was brought under the statute of North Carolina, passed in 1897; that it was independent of the Lord Campbell act; that its provisions were comprehensive enough to afford relief in this action; that the statute of limitations pertains merely to the remedy, and is governed by the *lex fori*. That statute is as follows: "Sec. 1. That any servant or employé of any railroad company operating in this state, who shall suffer injury to his person, or the personal representative of any servant or employé who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incapacity of any servant employé or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." The other section has no application to this case.

The respondent contends that this statute is but an enlargement of the provisions of the Lord Campbell act; ²⁵⁷ that they are in *pari materia* and must be construed together; that the time within which the action must be brought under the Lord Campbell act is in no sense a statute of limitations; and that any facts that would have destroyed the right of recovery if the suit had been instituted in North Carolina will defeat the action in this state.

The Lord Campbell act of North Carolina is as follows: "Whenever the death of a person is caused by the wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executors, administrators or collectors, and this notwithstanding the death, and although the wrongful act or neglect causing death amount in law to felony."

The statute of 1897 has been declared by the supreme court of North Carolina, in the case of *Hancock v. Norfolk etc. Ry. Co.*, 124 N. C. 222, 32 S. E. 679, to be constitutional. Our construction of the statute of 1897 is, that it was merely intended to enlarge the provisions of the Lord Campbell act; that it was in the nature of an amendment to that act; and that they must be construed together.

This action could not have been maintained in North Carolina after more than one year had elapsed from the death of the

person suffering the injury. In *Huntington v. Attrill*, 146 U. S. 657, 670, 13 Sup. Ct. Rep. 224, 228, 36 L. ed. 1123, the court says: "In order to maintain an action for an injury, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. . . . But such is not the law of this court. By our law a private action may be maintained in one state if not contrary to its own policy, for such a wrong done in another ²⁵⁸ and actionable there, although a like wrong would not be actionable in the state where the suit is brought": See, also 16 Harv. Law Rev. (Nov. 1902), No. 1, p. 63. As we have a statute which gives an action for wrongfully causing death, it is not against public policy to enforce such a liability here, although it arose in another jurisdiction: *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537. When such a liability is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act in any degree is subject to the *lex fori*, with regard either to its quality or its consequences: *Slater v. Mexican etc. R. R. Co.*, 194 U. S. 120, 126, 24 Sup. Ct. Rep. 581, 48 L. ed. 900. In the case last mentioned the court uses this language: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which like other obligations, follows the person, and may be enforced wherever the person may be found: *Stout v. Wood*, 1 Blackf. 71; *Dennick v. Central R. Co.*, 103 U. S. 11, 18, 26 L. ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith v. Condry*, 1 How. 28, 11 L. ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here, absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. ed. 958, 961, 14 Sup. Ct. Rep. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to

the accident of the place where the defendant may happen to be caught."

²⁵⁹ The two statutes of North Carolina must be construed together in determining the consequences of the wrongful act. The action in this state is encumbered with all the burdens arising out of either of said statutes. In *Taylor v. Cranberry Iron etc. Co.*, 94 N. C. 525, 526, the court thus construes the provision of the Lord Campbell act limiting the time within which the action must be brought: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it must be brought within one year after the death of the testator or intestate, else the right of action will be lost. It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun. The nature of the cause of action, when it occurred, and when this action began, plainly appeared from the complaint and summons, and as more than a year elapsed after the death of the intestate, and before the bringing of the action, it is clear it cannot be maintained, and the judgment must, therefore, be affirmed."

It is well settled in this state that the statute of limitations relates to the remedy and is enforced according to the *lex fori*: *Sawyer v. Macaulay*, 18 S. C. 543. But the requirement that the action shall be commenced within one year after the party is killed is not a statute of limitations. At common law there was no right of action for death caused by wrongful act. The requirement as to the time of commencing the action is a part of the statute creating this right. It is incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, one of which is that the suit must be instituted within a certain time. In North Carolina the failure to commence the action within one year did not simply extinguish the remedy, but was an extinction of the right conferred by the statute. ²⁶⁰ When such is the case the action cannot be maintained in this state: *Sawyer v. Macaulay*, 18 S. C. 543. The North Carolina decision is in harmony with the principle announced in *Walker v. Chester County*, 40 S. C. 342, 18 S. E. 936. That case was an action under the statute which gave a right of action for damages caused by a defect in the repair of a highway. The statute contained a proviso limiting the right of action to cases *inter alia*, where the plaintiff had

not brought about his injury by his own act or negligently contributed thereto. There was a demurrer to the complaint on the ground that it failed to allege that the plaintiff did not in any way bring about her injury by her own act or negligently contributed thereto. A county was not liable at common law in an action for injuries received from defects in the repair of a highway. This court held that the demurrer was properly sustained. Mr. Chief Justice McIver concurred on the ground that the conditions upon which the right is conferred must appear in the complaint, as otherwise no right of action is stated. These authorities are conclusive of the question under consideration.

It is the judgment of this court that the judgment of the circuit court be affirmed.

If a Death by Wrongful Act or neglect occurs in Montana, an action therefor may be maintained in Minnesota at any time within three years, the period of limitation of such actions being three years, under the statutes of Montana, but only two years under the statutes of Minnesota: *Negaubauer v. Great Northern Ry. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674.

GRANGER v. POSTAL TELEGRAPH COMPANY.

[70 S. C. 528, 50 S. E. 193.]

COTENANCY—Grant of Right of Way by One Tenant.—If one tenant in common grants to a telegraph company a right of way over the common property, his cotenant cannot maintain trespass against the company for the construction of its line, unless it commits a trespass by doing something not properly incident to the exercise of the right granted, or in injuriously exercising the right in a negligent or wanton manner. His remedy is under the condemnation statutes. (p. 752.)

A LICENSE to do an Act Implies Authority to do what is necessary for that purpose. (p. 753.)

Morgan, Mauldin & Mauldin, for the appellant.

J. P. Cary, for the respondent.

529 JONES, J. This appeal is from an order of nonsuit. Frances Granger, Mary Granger and Emily Granger were tenants in common of a tract of fourteen acres of land in Pickens county. On August 29, 1902, Mary Granger executed an instrument in writing, granting the defendant com-

pany "The right to construct and maintain its lines of telegraph, including necessary poles and fixtures, over the property which I own or in which I have any interest in the county of Pickens, state of South Carolina, and along the roads, streets and highways adjoining said property, with the right to remove all trees necessary for the proper erection and maintenance of said lines or poles, and to trim all trees necessary to keep the wires cleared at least twenty feet, to set necessary guy and brace poles, and to attach to the trees necessary guy wires. Damages to crops and timber are to be paid for at market value." This instrument was executed in the presence of plaintiff, doubtless with her approbation, as she testified, at folio 21, that she had signed an instrument giving permission to run the line over the land.

The Southern Railway divides the tract in question, leaving two acres on one side, containing plaintiff's dwelling-house, and twelve acres on the other side. The telegraph company located and constructed its line through the center of the twelve acre portion, parallel with the railway, and no objection is raised as to that location of its line. The plaintiff's dwelling fronts upon the highway, and is reached by a private road from the highway to the house. The employés ⁵³⁰ of the defendant, in hauling the necessary poles from the public highway, used the road leading to plaintiff's dwelling as far as it extended, and then went across plaintiff's land and the Southern Railway track to the claimed right of way. With reference to the route of the wagons, Mr. A. H. Wesley, a witness for the plaintiff, stated that they had to go that way as there was a branch or gully that kept them from going the other way without building a bridge. The hauling was done in early spring when the ground was very wet, so that the wagon wheels cut deep into the soil and some terraces on the land were run over and cut, thereby rendering the land liable to wash. Several times when the wagons got to the plaintiff's house and started in on the land, plaintiff told them not to go across the field. A part of this strip of land was woodland, and defendant cut a space through for its line about thirty feet wide. Plaintiff stated that defendant could have gotten off her land without its line running through the woods, and that she told them not to go across the woods. Plaintiff made no effort in the testimony to distinguish between injury to the land and timber within the right of way as located, and without the right of way; and in so

far as witnesses made any estimate of damages, it included the injury on the right of way claimed.

Upon the close of the testimony for plaintiff, tending to show facts as above stated, defendant moved for nonsuit upon two grounds: 1. That where permission to enter upon land of another is given, no action for trespass will lie; 2. That plaintiff's remedy was under the condemnation statutes. The nonsuit was sustained on these grounds and the exceptions question the correctness of the court's ruling.

The action in this case was not upon the contract contained in the instrument granting the right of way for damages to crops and timber at market value, as stipulated for therein, but was for damages for trespass as shown by the following allegation of the complaint: "That the defendant, its agents and employes, has heretofore ⁵³¹ trespassed, and is, at the time of filing this summons, trespassing upon the lands of the plaintiff by going upon the lands, cutting timber, wrongfully driving its wagons across tillable lands of the plaintiff, where it has no right so to do, and thereby breaking down terraces and causing the lands to wash and otherwise injuring the lands of the plaintiff, in violation of repeated warnings and objections from the plaintiff or her agent, whereby the plaintiff's lands, both forest lands and lands in cultivation, have been injured to the damage of the plaintiff in the sum of three hundred (\$300) dollars." It cannot, therefore, be contended that nonsuit was improper, because there was some evidence of damages to timber, and, under the contract, the cause should have been submitted to the jury. The action was in tort, and not on the contract.

Mary Granger, as tenant in common, had the right to grant permission to defendant company to construct and maintain its telegraph lines through the property, and especially as this was done with the knowledge and consent of plaintiff, there is no foundation for an action of trespass by reason of such construction, unless defendant had committed a trespass by doing something not properly incident to the exercise of the right granted, or in injuriously exercising the right in a negligent or wanton manner: *Railroad Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667, 11 S. E. 635; 39 S. C. 446, 17 S. E. 994; *Willoughby v. Railroad Co.*, 32 S. C. 410, 11 S. E. 539; *Rankin v. Sievern etc. R. R. Co.*, 58 S. C. 532, 36 S. E. 997; *Wallace v. Columbia etc. Ry. Co.*, 34 S. C. 62, 12 S. E. 815. Appellant's counsel conceded this in argument here; but contended that the case should have been submitted to the jury on the ground that

the complaint embraced an action for damages for negligent or wanton injury to plaintiff's land outside the right of way as granted and located. It is contended that the words in the complaint, alleging trespass by defendant upon the land "Where it has no right so to do," is equivalent to saying, "Outside the right of way granted." Even, if, by ⁵³² the most liberal construction, we should hold the allegation anything more than a legal conclusion and as meaning what is now contended for in behalf of appellant, still the nonsuit was not improper. The case was evidently conducted on circuit on the theory that damages could be recovered for alleged trespass upon the land, as an entirety, including that portion covered by the right of way. The testimony was so directed. Upon the testimony, it would be impossible for the jury to say what injury was sustained by plaintiff by reason of anything done outside the right of way, not necessarily incident to the exercise of the right granted. A license to do an act implies authority to do what is necessary for that purpose.

The defendant having entered for the construction of its line with the permission of plaintiff, her only remedy for damages incident to such entry and construction would be under the condemnation statutes—*Rankin v. Sievern etc. R. R. Co.*, 58 S. C. 532, 36 S. E. 997—unless the plaintiff should connect herself with the contract made with her cotenant, in which case her remedy would be under the contract.

The judgment of the circuit court is affirmed.

A Tenant in Common cannot grant an easement so as to confer a right which can be enforced against the other tenants: *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; note to *Benedict v. Torrent*, 21 Am. St. Rep. 594. An attempted dedication of common property to a public use as a highway by one tenant in common without the consent of his cotenants does not affect their rights: *St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197, 9 Am. St. Rep. 334; and a grant by a mother to a railway company of a right of way over land of which she is a tenant in common with her children, who reside with her, cannot have any effect on their rights: *Charleston etc. R. R. Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667.

That One Tenant in Common may maintain trespass in a proper case, see *Morgan v. Hudnell*, 52 Ohio St. 552, 49 Am. St. Rep. 741. Consult, in this connection, *Haley v. Taylor*, 77 Miss. 867, 78 Am. St. Rep. 549, and cases cited in the cross-reference note thereto.

SNIDER v. SNIDER.

[70 S. C. 555, 50 S. E. 504.]

CHARITABLE BEQUEST.—A Degree of Vagueness is allowable in charitable bequests. (p. 756.)

CHARITABLE BEQUEST to Unincorporated Society—Indefiniteness.—A bequest, without an appointment of a trustee or a specification of the purpose to which the fund is to be applied, direct to a university, which takes effect between the date of the expiration of the charter of the institution and its renewal, is valid. (p. 757.)

CHARITABLE BEQUEST to a Seminary or Mission —Indefiniteness.—A bequest to “The Southern Baptist Theological Seminary at Louisville, Kentucky,” and a bequest to “The Foreign Mission Board now at Richmond, Virginia,” no trustees being named and no specific purposes being mentioned to which the funds are to be applied, are valid. (p. 757.)

CHARITABLE USES—Statute of 43 Elizabeth.—Charitable uses and the jurisdiction of equity over them were fully and amply established before the passage of the Statute of 43 Elizabeth, chapter 4, and it had little, if any, effect in creating the jurisdiction of equity over charities or in enlarging the substantive law of charitable uses. (pp. 757, 758.)

Miller & Whaley, for the Furman University, Baptist Seminary, and Foreign Mission Board.

Raysor & Summers and Wolfe & Berry, for the heirs at law.

Izlar Brothers and Bates & Simms, for the executors.

556 WOODS, J. This action was brought by the executors of the will of William J. Snider to obtain the judgment of the court as to the construction of the will. The decree of the circuit judge makes quite clear the soundness of his conclusion as to the proportion in which the testator **557** intended the beneficiaries to take, and it is unnecessary to add anything to what he has said on that subject.

The most serious question involved in the appeal is the validity of the bequests made in the third clause of the will to “the Furman University,” “The Southern Baptist Theological Seminary at Louisville, Kentucky,” and “The Foreign Mission Board, now at Richmond, Virginia.” The circuit judge held all these bequests void for uncertainty and indefiniteness.

Furman University was chartered for fourteen years by act of the General Assembly, December 20, 1850, and the act by its terms was made a public act (12 Stats. 34). By act of December 20, 1866, the original act of incorporation was continued in force for thirty years (13 Stats. 458). After the

expiration of thirty years, on February 16, 1898, the charter was again renewed for thirty years. The will took effect on the death of the testator, December 10, 1897, between the date of the expiration of the charter in 1896, and its renewal in 1898. It is true, the act of 1898 provided: "That all acts of said corporation, and of its authorized agents, done and performed at any time since the expiration of its charter, and consistent therewith, shall be held, and the same is hereby declared, legal and valid" (22 Stats. 956), but this did not prevent the lapsing of the corporation from 1896 to 1898. If the charter of Furman University had been in force at the death of the testator, there could not be the slightest doubt the bequest to it would have been valid: *American Bible Soc. v. Noble*, 11 Rich. Eq. 156. But the charter having lapsed when the will took effect, there is no escape from regarding the university at that time an unincorporated society. No evidence was before the court as to the incorporation of "The Southern Baptist Theological Seminary at Louisville, Kentucky," or "The Foreign Mission Board, now at Richmond, Virginia."

The question, therefore, presented is whether the bequests to these unincorporated societies are void for uncertainty, no ⁵⁵⁸ trustees being named and no specific purpose being mentioned to which the fund was to be applied. There is perhaps no question of law on which the authorities are more at variance. The general proposition that a devise or bequest to an unincorporated society is good is established in this state, and sustained by very high authority elsewhere: *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724, 26 S. E. 717; *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349; *Bates v. Taylor*, 28 S. C. 476, 6 S. E. 327; *Wright v. Trustees, Hoff. Ch. (N. Y.)* 202. In these cases, however, the bequest was either to trustees for the benefit of the unincorporated society, or directly to the society with a direction as to the specific purpose for which the fund was to be used. A bequest to such a society by its name is taken by the individuals composing it as natural persons (*Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349), and it has been often argued from this principle that there is no criterion by which courts may limit and control the purposes and undertakings of such individuals, which, it is said, may be one thing to-day and another to-morrow, and so the court of equity would be powerless to prevent the diversion of the bounty of the testator to a purpose entirely foreign to his intention: *Owens v. Missionary Soc.*, 14 N. Y. 380, 67 Am. Dec.

160. This argument has never received indorsement in this state, and it seems neither convincing nor consistent. As we have seen, it is generally conceded, if the gift be to trustees for such a society without any specific mention of the purpose to which it is to be applied, the gift is valid and the court of equity will enforce the trust. It is not perceived that any different principle is applicable when the bequest is direct to the society. If the court can discern the will of the testator with sufficient definiteness to prevent the diversion of the funds in the hands of a trustee, it would know his intention with equal definiteness when the bequest is direct to the society. The question in each case is, Has the testator made plain the object of his bounty, so that the courts may enforce ⁵⁵⁹ the application of the fund as he intended? When this is the case, as said by Chancellor Harper, in *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349, the members of the society take as trustees. If, for instance, the bequest is direct to a society engaged in the promotion of education, upon the clearest reason, the testator should be regarded as having in view the special ends of the particular society, as indicated by its name, its constitution, by-laws, or articles of agreement, and its history. These often indicate the limitations of the benevolent enterprise of the society, with even more definiteness than the charter of an incorporated society.

Consider in this view the bequest to Furman University. The testator pointed out by the terms used an institution of learning in actual existence as a distinct university, and this implies an organization with a board of trustees, or other managers, conducting its affairs under some definite plan. A degree of vagueness is allowable in charitable bequests, and the courts would not interfere with changes in the institution so long as its general purposes were kept in view by those in control; but it cannot be doubted they would have full power to interfere to prevent the application of funds, bequeathed while the institution was unchartered, to enterprises altogether foreign to the purposes it was engaged in promoting when the bequest was made.

The bequest to "The Southern Baptist Theological Seminary at Louisville, Kentucky," is even more definite, because the name indicates more clearly the nature of the institution and the work in which it is engaged.

As such terms are understood throughout christendom in the use of the words, "The Foreign Mission Board now at Rich-

mond, Virginia," the testator meant to point out that there was an association or organization of that name in the city of Richmond engaged in Christian missionary work in foreign lands, and that he wished his bequest to go to that association to be used for that purpose in accordance with its ⁵⁶⁰ general plans, and in consonance with the particular creed of the branch of the church it represented.

In making these bequests, the testator asserted the institutions he named were in existence, having the definite characters and purposes to which we have alluded. If he was mistaken and such organizations do not exist, or if their charitable purposes are so vague and uncertain that there would be no ground upon which a court of equity could control the administration of the trust reposed in the members of such organizations, it was incumbent upon those who assailed the bequests to prove these facts. The court will no more assume such a state of facts against the assertion of the testator than it would assume a particular individual to whom a bequest had been made not to be in existence, or that a proper name used in a bequest did not identify a particular individual because of the great number who bore it. Such facts are not presumed, but must be established by evidence. Upon principle, therefore, the bequests are good.

While the authorities on the subject are divided, the conclusion we have reached is well supported: *Executors of Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154; *Hornbeck's Exr. v. American Bible Soc.*, 2 Sand. Ch. 145; *Hadden v. Methodist Soc.*, 32 L. R. A. 625, note. This view, we think, is also supported by the case of *Gibson v. McCall*, 1 Rich. 174. There the bequest was direct to the "Methodist Church at Darlington Courthouse, the preachers of the said Circuit, and the Peedee Mission." It is true, it was to be distributed by trustees, but there was no more definite instruction to them than that the distribution of the interest should be "according to the necessities of said church, preachers and mission."

It is urged, however, that a bequest made direct to an unincorporated society without the appointment of a trustee to hold it, can only take effect and be recognized as within the equitable jurisdiction of the courts in those states where the statute, 43 Elizabeth, chapter 4, is in force. Before the argument and decision of *Vidal v. Girard's Executors*, ⁵⁶¹ 2 How. (U. S.) 127, 11 L. ed. 205, it was supposed this statute enlarged the substantive law of charitable uses, and that it was the origin of the jurisdiction of courts of equity over charities. It is held now

to have had little if any effect in either regard, as charitable uses and the jurisdiction of courts of equity over them were fully and amply established before the passage of the statute. It is, therefore, of no consequence whether the statute is held to be in force in this state or not: *Attorney General v. Jolly*, 1 Rich. Eq. 99, 42 Am. Dec. 349; 2 Perry on Trusts, sec. 693 et seq.

The judgment of this court is, that the judgment of the circuit court be affirmed, except as to the bequests to "Furman University, The Southern Baptist Theological Seminary at Louisville, Kentucky, and The Foreign Mission Board now at Richmond, Virginia," and that as to these bequests it be reversed, and that the cause be remanded for such further proceedings as may be necessary.

On What are Charitable Uses or Trusts, see the monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 248-269; and on the certainty and unity required in charitable trusts, see the monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756-772; *Grant v. Saunders*, 121 Iowa, 80, 100 Am. St. Rep. 310, and cases cited in the cross-reference note thereto; *Thompson v. Brown*, 116 Ky. 102, 105 Am. St. Rep. 194. That a gift for a charitable purpose will not be allowed to fail for want of a trustee, see *Grant v. Saunders*, 121 Iowa, 80, 100 Am. St. Rep. 310; *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502. As to whether a charitable bequest or devise to an unincorporated society is good, see *Lane v. Eaton*, 69 Minn. 141, 65 Am. St. Rep. 559; *Dye v. Beaver Creek Church*, 48 S. C. 444, 59 Am. St. Rep. 724; *Lilly v. Tobbein*, 103 Mo. 477, 23 Am. St. Rep. 887; extended notes to *Bridges v. Pleasants*, 44 Am. Dec. 101; *Dashiell v. Attorney General*, 9 Am. Dec. 583; and as to whether a bequest to a corporation which ceases to exist before the death of the testator is good, see *Gladding v. Saint Matthew's Church*, 25 R. I. 628, 105 Am. St. Rep. 904; *Stratton v. Physio-Medical College*, 149 Mass. 505, 14 Am. St. Rep. 442. As to the effect or influence of the statute of 43 Elizabeth, chapter 4, on charities, see the monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 254.

CASES
IN THE
SUPREME COURT
OF
SOUTH DAKOTA.

STATE v. BURT.

[17 S. Dak. 7, 94 N. W. 409.]

WITNESSES—Wife Against Husband.—A statute forbidding a wife to be a witness against her husband without his consent except when he is prosecuted for the commission of a crime against her, limits her right to testify against him in a criminal proceeding without his consent, to crimes involving personal violence by him against her, and does not authorize her to testify against him, over his objection, in a prosecution for incest committed by him upon a third person. (p. 763.)

E. T. Taubman and L. W. Crofoot, for the plaintiff in error.

A. W. Burtt, attorney general, and J. H. Perry, state's attorney, for the state.

⁷ **HANEY, P. J.** The defendant was convicted of incest with his daughter, and sentenced to imprisonment for the term of ten years. It is contended that the judgment of the circuit court should be reversed because defendant's wife was examined as a witness on behalf of the state, without the defendant's consent, and against his objection. As the wife's testimony was decidedly damaging to the defendant, and proper and ⁸ timely objections were interposed, a reversal is unavoidable if she was not a competent witness against her husband without his consent. The statutes of this state contain the following provisions: "No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses, or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such per-

son is a party thereto; or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed or defended, except as hereinafter provided: 1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by one against the other": Dak. Comp. Laws 1887, sec. 5260. Under this statute a wife cannot be examined for or against her husband without his consent, except in "a criminal action or proceeding for a crime committed by one against the other." What, then, is "a crime committed by one against the other," within the meaning of this statute? The language employed is unfortunately indefinite and uncertain, and has caused the courts no little difficulty in ascertaining the legislative intent. The general rule of the statute is that neither husband nor wife can testify for or against the other without the other's consent. Certain criminal actions are excepted. ⁹ Clearly, all criminal actions are not excepted. It is only in an action for a crime committed by her husband against herself that the wife is a competent witness without his consent. Is incest such a crime? The same language is found in the statutes of Iowa and Nebraska, and the courts in those states hold that the wife is a competent witness against her husband in actions wherein he is charged with adultery, bigamy, or incest: *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *Owens v. State*, 32 Neb. 167, 49 N. W. 226.

It was a well-known rule of the common law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence the one upon the other, in which the necessities of justice compelled a relaxation of the rule: *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762. Under a statute allowing the wife to testify against her husband without his consent only in "a criminal action or proceeding for a crime committed by one against the other," it is held in Minnesota that the exception was inserted simply to save those cases where at common law the wife could be a witness against her husband, and not to

introduce any new rule or extend the old one: *State v. Armstrong*, 4 Minn. (Gil. 251) 335.

In Texas a statute providing that "the husband and wife may, in all criminal actions, be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other," has been construed to mean some act of personal violence by the one against the other; and in a case of incest, where the defendant's wife was permitted to testify ¹⁰ against him, the judgment was reversed for the reason that she was not a competent witness: *Baxter v. State*, 34 Tex. Cr. App. 516, 53 Am. St. Rep. 720, 31 S. W. 394.

Section 1881 of the California Code of Civil Procedure is identically the same as the statute of this state, heretofore quoted, so far as it relates to the examination of either the husband or wife without the other's consent. Section 1322 of the California Penal Code contains the following: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties." "We think," says the supreme court of that state, "upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other": *People v. Langtree*, 64 Cal. 256, 30 Pac. 813. These sections of the California codes are identical with those of Utah, which were construed by the United States supreme court in *Bassett v. United States*, wherein that learned court followed the supreme court of California holding that both sections meant the same thing; that they were merely declaratory of the common law; and that they did not permit a wife to testify against her husband, without his consent, in cases of polygamy or adultery. In that case Mr. Justice Brewer, speaking for the court, after stating the common-law rule, and alluding to the decisions in Iowa, Nebraska, Minnesota, and Texas, uses the following language: "We conclude therefore, that the section quoted from the Code of Civil Procedure, if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? ¹¹ The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such

a crime against the wife? That it is no wrong upon her person is conceded, and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common-law rule. We conclude, therefore, that under this statute the wife was an incompetent witness as against her husband."

Further citation of authorities is unnecessary to show that the language of our statute has been employed in numerous states, and that there is irreconcilable conflict regarding its proper construction in case of adultery, bigamy, and incest. After thoughtful consideration, ¹² realizing the importance of the question here presented to this court for the first time, we cannot avoid the conclusion that the legislature intended to exclude the wife's testimony in this class of cases when its introduction is not consented to by her husband. As heretofore suggested, the general rule relating to the examination of married persons excludes the testimony of each without the consent of the other. The competency of either in the absence of consent is the exception. He who relies upon an exception must show himself to be clearly within its provisions. Under the statute the wife can testify without consent only in a criminal action or proceeding for a crime committed by the husband against herself. An assault and battery by the husband upon the wife would certainly fall within the exception. An assault and battery upon a third person would as certainly not fall within the exception. In cases of rape the crime is committed against the outraged female. In cases of adultery and kindred offenses, the unlawful intercourse being voluntarily, both parties are at

fault, and it cannot be said that the crime is committed against any particular person.

With reference to this statute the husband's crimes might be classified thus: 1. Those which are against persons other than his wife; 2. Those which are against no particular person; and 3. Those which are against his wife. It is only in actions for crimes belonging to the last-mentioned class that the wife can testify for or against her husband without his consent. Had the defendant, in the case at bar, been a widower when the acts were done for which he is being punished, his crime would have been the same. The existence of the marital relation between the witness and the defendant did not in any legal ¹³ sense, affect or constitute any element of the crime for which he was convicted. Should we hold that the crime charged in this action was one against the wife, it would logically follow that the rape or murder of defendant's daughter would have been a crime against her within the meaning of the statute. To hold that a wife may testify for or against her husband, without his consent, in cases of incest, would be, in effect, to establish the rule that either husband or wife may testify for or against the other, without consent, in all actions wherein either is defendant; and such was manifestly not the legislative intent. With the policy of this statutory rule the courts are not concerned. If the law should be changed, the duty of changing it devolves upon the legislature, not upon this court. As all the wife's testimony should have been excluded because she was not a competent witness, assignments of error relating to particular portions of it need not be considered.

The judgment of the circuit court is reversed and a new trial ordered.

HUSBAND AND WIFE AS WITNESS FOR OR AGAINST EACH OTHER IN CRIMINAL PROSECUTIONS.

- I. Criminal Prosecutions Generally, 764.**
- II. Personal Injury to One Spouse Inflicted by the Other.**
 - a. Right of Either to Testify, 765.**
 - b. Compelling Husband or Wife to Testify, 766.**
- III. Crime Committed Before Marriage.**
 - a. General Rule, 767.**
 - b. Rape, 767.**
 - c. Abortion, 767.**
- IV. Incest, 767.**
- V. Bigamy.**
 - a. Competency of Lawful Wife, 768.**
 - b. Competency of Second or Bigamous Wife, 769.**
- VI. Adultery, 769.**

I. Criminal Prosecutions Generally.

At the common law the rule was that a husband and wife could not testify for or against each other in any criminal proceeding except in the prosecution of the one for criminal injury to the other. This rule was adopted in the several states of the United States, and now generally prevails therein, although in some of the states it has been expressly abrogated by statute.

This rule is based upon considerations of public policy, growing out of the marital relation, and the reason therefor is because husband and wife are regarded in law as one person, and that to allow one to testify for or against the other would be to subject him or her to great temptation to commit perjury, and it would endanger the harmony and confidence of the marital relation.

In the following cases it is expressly maintained that, on principles of public policy, the wife is not a competent witness for or against her husband when he is on trial in a criminal prosecution, for a crime not committed against her: *Kinnemer v. State*, 66 Ark. 206, 49 S. W. 815; *Donnelly v. State*, 78 Ala. 453; *Merriwether v. State*, 81 Ala. 74, 1 South. 560; *Hussey v. State*, 87 Ala. 121, 6 South. 420; *Lide v. State*, 133 Ala. 43, 31 South. 953; *Lucas v. State*, 23 Conn. 18; *Taubman v. State*, 37 Ind. 353; *State v. Pain*, 48 La. Ann. 311, 19 South. 138; *Turpin v. State*, 53 Md. 462; *Commonwealth v. Barker*, 185 Mass. 324, 70 N. E. 203; *People v. Gordon*, 100 Mich. 518, 59 N. W. 322; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440; *Lapsley v. Howard*, 119 Mo. 489, 24 S. W. 1020; *State v. Kodat*, 158 Mo. 125, 81 Am. St. Rep. 292, 59 S. W. 73, 21 L. R. A. 509; *State v. Straw*, 50 N. H. 460; *State v. Moulton*, 48 N. H. 485; *People v. Crandon*, 17 Hun, 490; *Wilke v. People*, 53 N. Y. 525; *Schultz v. State*, 32 Ohio St. 276; *Gibson v. Commonwealth*, 87 Pa. St. 253; *Owen v. State*, 89 Tenn. 698, 16 S. W. 114; *Miller v. State*, 106 Wis. 156, 81 N. W. 1020; *Kraimer v. State*, 117 Wis. 350, 93 N. W. 1097; *United States v. Jones*, 32 Fed. 569.

In the following cases it has been expressly ruled that a husband is not a competent witness for or against his wife on a prosecution of her for a crime not committed by her against him: *Stephens v. State*, 106 Ga. 116, 32 S. E. 13; *Rivers v. State*, 118 Ga. 142, 44 S. E. 859; *Kingen v. State*, 50 Ind. 557; *Baker v. State*, 120 Wis. 135, 97 N. W. 566. "The incompetency of the wife as a witness for the husband in a criminal prosecution, or of the husband for the wife, is too well settled by the many decisions of this court to call for discussion": *Lide v. State*, 133 Ala. 43-60, 31 South. 953.

In some of the states where the common-law rule making husband and wife incompetent to testify for or against each other in criminal prosecutions formerly prevailed, it has now been expressly abrogated by statute and either husband or wife, if willing, can testify for or against the spouse: *Everett v. State*, 33 Fla. 661, 15 South.

543; *Walker v. State*, 34 Fla. 167, 43 Am. St. Rep. 186, 16 South. 80; *Hutchason v. State*, 67 Ind. 449; *State v. Geer*, 48 Kan. 752-754, 30 Pac. 236; *Commonwealth v. Barker*, 185 Mass. 324, 70 N. E. 203; *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679. But it is generally maintained under such statutes that the husband or wife must testify voluntarily, and that neither can be compelled to testify against the other: *Kyle v. Frost*, 29 Ind. 383; *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469; *Commonwealth v. Barker*, 185 Mass. 324, 70 N. E. 203; *Buchanan v. State*, 41 Tex. Cr. App. 127, 52 S. W. 769. In Maine, a statute exists under which a husband or wife may be compelled to testify either for or against the other in criminal proceedings against either: *State v. Black*, 63 Me. 210.

II. Personal Injury to One Spouse Inflicted by the Other.

a. **Right of Either to Testify.**—At common law a wife was a competent witness to testify against her husband in relation to offenses alleged to have been committed by him upon her, and this rule of the common law generally prevails in this country. Hence, in the absence of any statute on the subject, a wife is competent to testify against or for her husband in any criminal action, whenever she is the individual particularly and directly injured, or affected by the crime for which he is being prosecuted: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229. A wife is a competent witness against her husband when he is charged with having committed or attempted to commit, a crime against her person or liberty during the existence of the marriage: *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, 14 S. W. 834. It must also be regarded as settled, that when in any case husband and wife are competent witnesses against each other, they are also competent witnesses for each other: *Tucker v. State*, 71 Ala. 342.

In a prosecution against a husband for an assault and battery upon his wife, she is a competent witness against him: *Soule's Case*, 5 Me. 407; *Hanon v. State*, 63 Md. 123; *People v. Sebring*, 66 Mich. 705, 33 N. W. 808; *State v. Boyd*, 2 Hill, 288, 27 Am. Dec. 377; *State v. Davis*, 3 Brev. 3, 5 Am. Dec. 529; *United States v. Fitton*, 4 Cranch C. C. 658, Fed. Cas. No. 15,106; *United States v. Smallwood*, 5 Cranch C. C. 35, Fed. Cas. No. 16,316. And in such case she is also a competent witness for him to disprove the charge: *State v. Neill*, 6 Ala. 685; *Tucker v. State*, 71 Ala. 342; *Commonwealth v. Murphy*, 4 Allen, 491. As she is a competent witness for the prosecution, she may be called as a witness in behalf of her husband, when the prosecution fails to call her: *People v. Fitzpatrick*, 5 Park. C. C. 26. On a prosecution of a husband for an attempt to kill his wife, she is a competent witness as to the injury threatened and attempted to her person by him: *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106; *State v. Parker*, 42 La. Ann. 972, 8 South. 473.

In a prosecution against a husband for making serious threats to kill his wife, she is a competent witness against him: *Murray v. State* (Tex. Cr. Rep.), 86 S. W. 1024. On the trial of a husband for administering poison to his wife, with intent to kill, she is a competent witness for the prosecution: *People v. Northrup*, 50 Barb. 147; *Davis v. Commonwealth*, 99 Va. 838, 38 S. E. 191. A wife is competent to testify against her husband on prosecution for perjury in making a false affidavit in his suit for divorce from her: *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229. A wife is a competent witness against her husband or against him and another jointly, in the trial of an indictment for using an instrument, with intent to procure a miscarriage or abortion of his wife while pregnant: *State v. Dyer*, 59 Me. 303; *State v. Briggs*, 9 R. I. 361, 11 Am. Rep. 270. In a prosecution against a husband for producing an abortion on his wife by an unlawful and violent assault upon her, she is a competent witness against him: *Navarro v. State*, 24 Tex. App. 378, 6 S. W. 542. In a prosecution for murdering an infant child, alleged to have been caused by defendant beating his wife before its birth, she is a competent witness for the defense, as well as for the prosecution: *Clarke v. State*, 117 Ala. 1, 67 Am. St. Rep. 157, 23 South. 670.

In a prosecution for an assault with intent to rape, committed by the defendant against his wife, she is not a competent witness against him, as such an assault is not any crime against the wife: *Frazier v. State* (Tex. Cr. Rep.), 86 S. W. 754. On the prosecution of the husband and father for an indecent assault upon the person of his daughter, his wife is not a competent witness against him, as the crime does not directly affect her: *People v. Westbrook*, 94 Mich. 629, 54 N. W. 486.

The husband may become a competent witness against or for his wife. Thus in a prosecution of a wife for an assault upon her husband, he is a competent witness for the state or prosecution: *State v. Davidson*, 77 N. C. 522; *Whipp v. State*, 34 Ohio St. 87, 32 Am. Rep. 359.

b. Compelling Husband or Wife to Testify.—An exception to the rule that the husband and wife are incompetent to testify for or against each other exists in the case of a criminal prosecution of the one for an offense committed against the other, and being competent to testify in such case, it is not optional with either husband or wife, when called as a witness in such case, to testify or not, as he or she may elect, but if presented as a witness he or she may be compelled to testify: *Bramlette v. State*, 21 Tex. App. 611, 57 Am. Rep. 622, 2 S. W. 765. On a prosecution of a husband for an assault and battery on his wife, she is not only competent to testify as a witness against him, but may be required to do so against her objection: *Johnson v. State*, 94 Ala. 53, 10 South. 427; *Turner v. State*, 60 Miss. 351, 45 Am. Rep. 412.

III. Crime Committed Before Marriage.

a. **General Rule.**—It seems that the wife of a person accused of crime committed against a third person is not a competent witness for or against him, and this is true, although at the time of the commission of the offense, she was not the defendant's wife, she having married him subsequent to the commission of the crime, but before the trial: *Elmore v. State*, 140 Ala. 184, 37 South. 156. And under a statute which prohibits the examination of one spouse as a witness against the other without his or her consent, but which prohibition does not apply to a criminal proceeding for a crime committed by one against the other, a wife is not a competent witness against her husband in a prosecution against him for a crime committed against her before they were married: *State v. Frey*, 76 Minn. 526, 77 Am. St. Rep. 660, 79 N. W. 518.

b. **Rape.**—Thus under statutes declaring that neither husband nor wife shall be competent as a witness for or against the other, except in a criminal prosecution for a crime committed by one against the other, a wife cannot be a witness against her husband in a prosecution against him for a rape committed upon her prior to the marriage: *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 59 L. R. A. 588; *State v. McKay*, 122 Iowa, 658, 98 N. W. 510; *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439; *State v. Frey*, 76 Minn. 526, 77 Am. St. Rep. 660, 78 N. W. 518; *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549, 39 S. W. 462.

c. **Abortion.**—On the trial for an abortion committed upon an unmarried female, with her consent, and who subsequently married the defendant, she is incompetent to testify against him, although she was not his wife at the time of the transaction. The acts of violence, if any, constituting the abortion, were not acts of personal violence directed against defendant's wife, because she was not his wife at the time: *Miller v. State*, 37 Tex. Cr. Rep. 575, 40 S. W. 313.

IV. Incest.

Whether the wife is a competent witness against her husband when he is prosecuted criminally for the crime of incest, is an unsettled question. Perhaps the better rule is that in such case she is not competent as a witness against him on the ground that such crime involves no personal violence against her, and hence she cannot be a witness against him without his consent. Such was the holding in the principal case and in *Compton v. State*, 13 Tex. App. 271, 44 Am. Rep. 703, overruling *Morrill v. State*, 5 Tex. App. 447, and *Roland v. State*, 9 Tex. App. 277, 35 Am. Rep. 743, it was held that under a statute permitting husband and wife to testify the one against the other for an offense committed by one against the other, she is not competent against her husband on a prosecution against him for incest with her daughter, his stepdaughter. And to the same effect is the case of *People v. Westbrook*, 94 Mich. 629, 54 N. W. 486.

On the other hand it has been held with equal firmness and in the face of authority that a prosecution of a husband for incest is a criminal proceeding for a crime committed against his wife and she is therefore a competent witness against him under a statute declaring that neither husband nor wife shall be a witness against the other except in a criminal prosecution for a crime committed by one against the other: *State v. Chambers*, 87 Iowa, 1, 43 Am. St. Rep. 349, 53 N. W. 1090.

V. Bigamy.

a. **Competency of Lawful Wife.**—It was a well-known rule of the common law that neither husband nor wife was a competent witness against the other in a criminal action against the one, except in cases of personal violence by one upon the other, and under this rule it was held that bigamy by the husband was not a crime especially against the wife. Hence, she was incompetent as a witness against him when he was being prosecuted for bigamy. Statutes in many of the states provide in effect that the husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in cases where the cause of action grows out of a crime or personal wrong or injury done by one to the other. Even under such statutes the majority of the cases hold that the common-law rule must prevail on the ground that bigamy is not an offense against the wife directly, wherefore she is not a competent witness against her husband when he is charged with that offense. She cannot be called by the prosecution to prove her marriage with the accused, nor for the purpose of identifying him or otherwise testifying against him. In other words, these cases hold that in a prosecution for bigamy, the first and lawful wife of the accused cannot be called and her testimony admitted against her husband: *Williams v. State*, 44 Ala. 24; *Salter v. State*, 92 Ala. 68, 9 South. 550; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *State v. McDavid*, 15 La. Ann. 403; *People v. Quanstrom*, 93 Mich. 254, 53 N. W. 165, 17 L. R. A. 723; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *Wilson v. Hill*, 13 N. J. Eq. 143; *People v. Houghton*, 24 Hun, 501; *Boyd v. State*, 33 Tex. Cr. 470, 26 S. W. 1080; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. Rep. 165, 34 L. ed. 762. While this rule may be technically correct, we doubt its soundness, and are inclined to adopt the following language as stating a better reason for a different rule: "The propriety of the exclusion of the testimony of the lawful wife on the trial of her husband for the crime of bigamy may well be doubted. Having once, for just and necessary reasons, admitted an exception to the general rule, in the case of a wife who has sustained a personal injury from her husband, is there any principle on which it can be held not to include that case where the injury to herself and her family is the greatest from a desertion

of them both by the head of the family? Nor is the reason of exclusion founded on the peace of families here of the slightest weight, but rather the reverse, for a husband who has been guilty of bigamy has proved himself dead to all sentiments of that description, and, having already deserted his first wife for another woman, he has given the clearest evidence that no further family dissensions need be apprehended from her appearing to give evidence against him": *State v. McDavid*, 15 La. Ann. 403, 404. And in some jurisdictions the better rule prevails that upon the trial of an indictment for bigamy the legal husband or wife of the defendant is a competent witness on behalf of the prosecution on the ground that bigamy is a crime committed against the innocent spouse: *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706; *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 40 N. E. 846, 28 L. R. A. 318; *Hills v. State*, 61 Neb. 589, 85 N. W. 836; *State v. Melton*, 120 N. C. 591, 26 S. E. 933.

b. **Competency of Second or Bigamous Wife.**—On the prosecution of a husband for bigamy, so long as the fact of his first marriage is contested, the second or bigamous wife is an incompetent witness for or against him. But where the fact of the first marriage has by other evidence been duly established to the satisfaction of the court, the evidence of the woman claiming to be his second wife may be admitted to prove her marriage with him: *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481. In a prosecution for bigamy, where two successive marriages are charged, it is only in cases where the first marriage is not controverted, or has been established by other evidence, that the second wife is competent to testify. She is not competent to prove the first marriage, where that is controverted. Hence, she cannot testify as to admissions made by the defendant concerning the existence of the first marriage: *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165. But, if in a prosecution for bigamy, the first marriage is established by competent evidence, the second wife is competent to testify to the second marriage: *Salter v. State*, 92 Ala. 68, 9 South. 550; *Clark v. People*, 178 Ill. 37, 52 N. E. 857; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *State v. Shreve*, 137 Mo. 1, 38 S. W. 548.

VI. Adultery.

The majority of cases hold that on a prosecution for adultery, the wife of the accused husband, or the husband of the accused wife, is not a competent witness against the other. The reason given for the rule, when any reason is given, is that the crime of adultery is not an offense against, or personal violence offered to the innocent spouse, and further, because of the policy of the law which excludes the husband and wife from testifying when the rights of either are concerned, and again because of the family dissensions which would arise if one was permitted to testify against the other

accused of adultery: *State v. Gardner*, 1 Root, 485; *Howard v. State*, 94 Ga. 587, 20 S. E. 426; *State v. Armstrong*, 4 Minn. 335; *State v. Vollander*, 57 Minn. 225, 58 N. W. 878; *Commonwealth v. Sparks*, 7 Allen, 534; *People v. Isham*, 109 Mich. 72, 67 N. W. 819; *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *People v. Imes*, 110 Mich. 250, 68 N. W. 157; *Mills v. United States*, 1 Pinney, 73; *Crawford v. State*, 98 Wis. 623, 67 Am. St. Rep. 829, 74 N. W. 537, where it is distinctly held that in a prosecution for adultery, a wife is not permitted to testify against her husband. This rule would, however, seem to be modified if not overruled, in Wisconsin, because in the late case of *State v. West*, 118 Wis. 469, 99 Am. St. Rep. 1002, 95 N. W. 521, it was held that the rule that neither husband nor wife can testify for or against each other, is confined to cases where the testimony, if given, would be by one directly for or against the other, and hence does not render a husband incompetent to testify as to the fact of marriage and incriminating circumstances in a criminal prosecution of another for adultery with the wife of the witness.

It has been held that, under a statute providing that the husband and wife shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other, if there is a joint prosecution of a husband and another woman for adultery, the wife of the man is not a competent witness against the parties under any conditions: *McLean v. State*, 32 Tex. Cr. 521, 24 S. W. 898.

On the other hand, there is a respectable array of authority to sustain the proposition that under statutes permitting husband and wife to testify against each other in a criminal prosecution for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery: *State v. Bennett*, 31 Iowa, 24; *State v. Russell*, 90 Iowa, 569, 58 N. W. 915; *Lord v. State*, 17 Neb. 526, 23 N. W. 507; *State v. McDuffie*, 107 N. C. 885, 12 S. E. 83; *Roland v. State*, 9 Tex. Ct. App. 277, 35 Am. Rep. 743. In a late case in Alabama—*Pruett v. State* (Ala.), 37 South. 343—it was held that in a prosecution for adultery the husband of the woman with whom defendant was charged with living in adultery was not incompetent to testify by reason of his marriage. This case follows the decision in *Campbell v. State*, 133 Ala. 158, 32 South. 635. The fact that a criminal proceeding for adultery must be commenced by the husband or wife of one of the guilty parties does not make the complainant a party to the case, so as to render him or her incompetent as a witness against the spouse: *Parsons v. People*, 21 Mich. 509. On the trial of an indictment for adultery, the husband of the particeps criminis, it has been held, is a competent witness to prove circumstances which do not directly, but tend to, criminate her: *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124.

BOARD OF EDUCATION OF DEADWOOD v. MANSFIELD.

[17 S. Dak. 72, 95 N. W. 286.]

MINES AND MINING—Townsite Patents.—The officers of the land department, in issuing a townsite patent, must necessarily pass upon the mineral or nonmineral character of the land, and the patent issued by the government can be attacked only by a direct proceeding by or under the direction of the government of the United States. (p. 774.)

MINES AND MINING.—Townsite Patents issued by the officers of the land department of the United States cannot be collaterally attacked by persons locating mining claims subsequent to the entry of the townsites and the issuance of the patents therefor, on the ground that the land covered by such patents was known to be mineral at the time of its entry, and hence did not pass under the patents. (p. 776.)

G. G. Bennett, for the appellants.

Mason & Mason, for the respondents.

74 CORSON, J. This is an action to quiet the title to certain town lots in the city of Deadwood. It is alleged in the complaint, in substance, that the plaintiff, a municipal corporation, and the county judge are the owners in possession and entitled to the possession of certain town lots therein described, and that the defendants claim and assert some estate and interest in and to the said premises adverse to the plaintiffs. The plaintiffs also allege in their complaint that they claim title to the said property under and by virtue of the entry of the same as a townsite in 1878, and confirmed by patent in 1886, and they pray for judgment that the title of the plaintiffs to said lots may be declared to be perfect and valid, and that the defendants and all persons claiming under them be forever barred from asserting or claiming any interest in the said property, or any part thereof.

The defendants, in their answer, admit the entry of the townsite of the city of Deadwood, and the issuance of the patent therefor, and that the lots in controversy are within the exterior boundary of the said townsite, but deny that the said patent conveyed to or vested any title, either legal or equitable, in the plaintiffs, or either of them, to the said lots embraced or covered by those certain mining claims or locations designated and described as the "Infant Lode," the "Caroline Lode," the "Yellow Bank Extension Lode," the "General Thomas Francis Maher

Lode," and the "Kalamazoo Lode," all adjoining and situated on the divide between City creek and Deadwood creek, within the corporate limits of the said city of Deadwood; that at the date of the entry ⁷⁵ for patent for the said townsite of Deadwood on or about the twenty-ninth day of July, 1878, and long prior thereto, and at the date of the issuance of the patent for the same on November 17, 1886, and at the time of the commencement of this action, all and each of said mining claims contained, and were at said periods known to contain, valuable deposits of quartz rock in place bearing gold and silver, and were at each of said dates, and now are, known to be valuable for mining purposes, and by reason thereof they and each of the said mining claims were, under the laws of the United States, excluded from such entry and from the grant of such patent. Defendants deny that said claims and interest of the defendants are junior or inferior to and of no validity as against the title of the plaintiffs, as alleged in their complaint, but allege that the title and interest of these defendants in and to the portions of the premises covered by and included in said mining claims are prior to any pretended right or title of the plaintiffs, or either of them, in and to the same, or any part thereof. The defendants, in their answer, by way of an affirmative defense or counterclaim, after setting out their title to the said mining claims, aver: "That each and all of said mining claims contain valuable veins and lodes bearing gold and other minerals of great richness, and the same were known to exist, were claimed, located and worked before and at the time the townsite of Deadwood was entered for patent, at the date of the said patent, and at the time this action was commenced. That subsequent to said entry of said townsite, said mining claims so located prior to said entry were abandoned, and the ground became abandoned and vacant, subject to relocation as abandoned mining ground." It is further alleged that the several mining claims were relocated ⁷⁶ at various dates between April, 1890, and March, 1893, and all the requirements as to such location are fully and in detail set out in the answer, and the defendants pray for judgment that their title to the said mining claims may be quieted in them as against said plaintiffs. To this answer the defendants interposed a demurrer upon the ground that said answer does not state facts sufficient to constitute a defense or counterclaim. This demurrer was sustained, and the defendants electing to stand upon their answer, a judgment was entered in favor of the plaintiffs, and from this judgment the defendants have appealed to this court.

For the purposes of this decision, we must assume that the facts alleged in the answer are true. It will be observed that by the answer the defendants allege that they are the owners of certain mining claims located by them, their grantors, and predecessors in interest since the entry and patent of the townsite, but that said mining claims were known to contain valuable deposits of gold-bearing quartz rock, and were claimed, located, worked and held under the then existing laws prior to and at the time the townsite of Deadwood was entered for patent.

The appellants contend: 1. That the answer in this case alleges that the premises in controversy were known to contain valuable deposits of gold-bearing ore before and at the time of the townsite entry by the county judge, and that by reason thereof the mining claims in controversy were excluded from the townsite patent; 2. That the allegations of the answer clearly show that the mining claims in controversy were located, worked and held under the then existing laws, as such mining claims, prior to and at the time of such entry, and ⁷⁷ were, therefore, excluded from the townsite patent; 3. That the answer sufficiently shows that the defendants, their grantors and predecessors in interest, complied with the mining laws, rules and regulations in locating said mining claims.

It is insisted by the respondents: 1. That the townsite patent cannot be attacked by the defendants, as their rights, if any, in the land, attached after the issuance of the patent, and that it can be assailed only in a direct proceeding by the United States; 2. That as the defendants' alleged rights were not initiated until after the issuance of the townsite patent, they are not in a position to assail that patent in this collateral proceeding on the ground that the lands embraced within the patent were known to be mineral at the time of the patent.

As we have seen, the townsite entry was made July 29, 1878, and the patent issued November 17, 1886. The first mining claim of the defendants was alleged to have been located April 13, 1890, and the last March 7, 1893. While it is alleged in the answer that the mining lodes claimed by the defendants were located prior to the entry of the townsite and the issuance of the patent therefor, defendants do not claim to have succeeded to the rights of any of the older locators, and they do not plead those former mining locations for the purpose of in any way connecting themselves therewith, but only for the purpose of showing that the land was excepted from the patent. It will be observed, therefore, that the mining claims upon which the de-

fendants predicate their claim of title and right of possession were all located, their boundaries marked, and were recorded long subsequently to the entry of the townsite and the issuance of the patent upon said entry.

⁷⁸ The question presented, therefore, is, Can a party go upon a patented townsite, and locate a mining claim, upon the theory that the ground so located was known to be mineral at the time the townsite was entered, and hold the same as against parties claiming title under the townsite patent? As we have seen, the appellants contend that this can be lawfully done upon the theory that the ground, being mineral land, was excepted from, and therefore did not pass by virtue of, the townsite patent. The townsite law contains the following provision: "No title shall be acquired under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws": U. S. Rev. Stats., sec. 2392 (U. S. Comp. Stats. 1901, p. 1459).

The same or similar provisions have been made in most of the grants to railroad companies and homestead and pre-emption laws, and it has been quite uniformly held that the question of whether or not lands located and held under any of the various provisions of the land laws are mineral lands, is to be determined by the land department, to which the administration of land laws has been committed. The officers of the land department, in issuing a patent, must necessarily pass upon the mineral or nonmineral character of the land, and the patent issued by the government can only be attacked by a direct proceeding by or under the direction of the government of the United States: *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238; *Carter v. Thompson* (C. C.), 65 Fed. 329; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992; *Mining etc. Co. v. Spargo* (C. C.), 16 Fed. 348; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226; *Petroleum Co. v. Tulare Oil etc. Co.* (C. C.), 67 Fed. ⁷⁹ 226; *Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064; *New Dunderberg M. Co. v. Old*, 79 Fed. 598, 25 C. C. A. 116.

The facts alleged in the case of *Carter v. Thompson* are very analogous to those alleged in the complaint in the case at bar. In that case the plaintiff made the location of a placer claim within the limits of the patented townsite of Helena, and there were allegations in his bill that the premises in dispute were mineral lands, and were known to be such at the time and prior to the application to enter such land under the townsite law.

Plaintiff's location was made in September, 1893, and the townsite patent was issued in June, 1872. The demurrer to the complaint was sustained by the United States district court, and the appeal dismissed. In the opinion sustaining the demurrer that court says: "It seems to be claimed that as the lands were known to be mineral before the application or issuing of the patent, therefore it is void. The question as to whether the land was mineral or not was one upon which the land department passed in issuing the patent to Miers F. Truett, the probate judge." The court, after reviewing a number of decisions involving this question, says: "The conclusion is that the land granted to Miers F. Truett in trust for the Helena townsite must be classed as nonmineral. It was so determined by the land department. This determination cannot be attacked in a collateral proceeding. . . . If any fraud was practiced, or any mistake of law or fact occurred in issuing the patent to the townsite, the complainant cannot take advantage of this. He had no rights at the time to be affected by either the fraud or mistake. . . . Complainant, therefore, by his own showing, presents facts to the court which show that he is not entitled to recover in this ⁸⁰ case."

The case of *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238, is also, in its facts, quite analogous to the case at bar although in that case the plaintiffs had acquired a patent for the mining claim located by their intestate. The plaintiffs had recovered judgment in the trial court for the ground claimed by them under their location as against the defendant who claimed the property under the townsite patent of Butte. On appeal to the supreme court of Montana this judgment was affirmed, but upon appeal from that court to the supreme court of the United States the judgment was reversed. The latter court, in an exhaustive opinion by Mr. Justice Field, goes over the whole subject. In speaking of the jurisdiction of the land department of the government, the court says: "It would seem, from this uniform construction of that department of the government specially intrusted with the supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from the grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their

extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. There has been no direct adjudication upon this point by this court, but this conclusion is a legitimate inference from several of its decisions. It was implied in the opinion in *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423, already referred to, and in the cases of *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 328, 8 Sup. Ct. Rep. 131, 31 L. ed. 182, and *United States v. Iron Silver Min. Co.*, 128 U. S. 673, 683, 9 Sup. Ct. Rep. 195, 32 L. ed. 571."

Again the court says: "The laws of Congress provide that valuable mineral deposits in lands of the United States shall be open to exploration and purchase. They do not provide, and never have provided, that such mineral deposits in lands which have ceased to be public, and become the property of private individuals, can be patented under any proceedings before the land department or otherwise. . . . But it is not perceived whether the jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals—which was the case here—if the lots for which the defendants received a deed were included within the townsite patent, and the location of the mining claim was subsequently made. Nor is there in this statement anything at all inconsistent with the decision of this court in *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389, 27 L. ed. 226. . . . We were speaking at that time of townsites for which no patent had been issued, and of mines in public lands. . . . Valuable mineral deposits in such lands outside of the patent are equally open to exploration and purchase as those in the lands outside. It was in reference to mines in unoccupied public lands in unpatented townsites that the language in *Steel v. Smelting Co.* was used, and to them and to mines in public lands in patented townsites outside of the limits of the patent it is only applicable. We agree to all that is urged by counsel as to the conclusiveness of the patents of the land department when assailed collaterally in actions at law. We have had occasion to assert their unsaisability in such cases in the strongest terms, both ⁸¹ in *Smelting Co. v. Kemp*, 104 U. S. 636, 640-646, 26 L. ed. 875, and in *Steele v. Smelting Co.*, 106 U. S. 447, 451, 452, 1 Sup. Ct. Rep. 389, 27 L. ed. 226." It will thus be seen that there is nothing in the opinion in the case of *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, 29 L. ed. 423, and the cases above

mentioned, as explained by the court, that supports the theory of the appellants. In *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. ed. 992, the supreme court of the United States says: "It is this established doctrine, expressed in numerous decisions of the court, that wherever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, the department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack." It is quite clear, therefore, that the appellants were not authorized to locate the ground in controversy, and that they failed in their answer to state facts sufficient to constitute a defense to the action of the plaintiffs.

The patent to the Deadwood townsite passed the entire title as against any subsequent locators, and the patent cannot be attacked collaterally in this action. The land officers were charged with the duty of ascertaining whether the lands were subject to be patented as a townsite, and their determination is conclusive, at least in this action. As is said by the supreme court of the United States in *Davis v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. Rep. 628, 35 L. ed. 238, no provision has been made for the location of valuable mineral deposits in lands which have ceased to be public, and ⁸³ which have become the property of private parties under any proceedings, under the land department or otherwise. Any other construction would be disastrous in the extreme to the holders of property under a townsite patent. If lands which a party has actually and peacefully enjoyed, claiming title under a townsite patent, can be entered upon and prospected for a mine by any parties who choose to do so upon the theory that such property was known to contain valuable deposits of mineral-bearing rock before the patent was issued and the land can be located, the patent, instead of being a muniment of title upon which the patentee or his grantees can rely in security, would be a delusion and a snare.

We are of the opinion, therefore, that the circuit court was right in sustaining the demurrer, and the judgment and orders of that court are affirmed.

The Issuing of a United States Patent for land as agricultural in character is a judgment of the tribunal having jurisdiction that such is the character of the land, which cannot afterward be attacked collaterally: Paterson v. Ogden, 141 Cal. 43, 99 Am. St. Rep. 31.

IOWA NATIONAL BANK v. SHERMAN.

[17 S. Dak. 396, 97 N. W. 12.]

CORPORATIONS—Transfer of Notes by President.—The president of a manufacturing corporation, which receives, in the usual course of business, notes for its products, is presumed to have authority to transfer by indorsement a note made payable to such corporation. (p. 779.)

BANKS AND BANKING—Authority of Teller to Discount Paper.—Authority of a bank teller to accept and discount a certain note for a particular person is shown by the fact that he was accustomed to accept and discount notes for that person and for other persons doing business with the bank, and that such transactions had been approved by the bank officials. (p. 780.)

CORPORATIONS—Transfer of Negotiable Paper—Notice.—Although the president and the cashier are officers and stockholders in another corporation, which is the payee of a note transferred to the bank, the bank is not charged with constructive notice of defenses of the maker against such payee, of which neither of such officers had actual notice. (p. 782.)

BILLS AND NOTES—Bona Fide Holders.—The transfer of a negotiable note before maturity, or of its proceeds to the credit of the transferrer in payment of a pre-existing debt, is of itself a sufficiently valuable consideration to constitute the transferee a bona fide holder, and to entitle him to protection as against infirmities in the paper of which he had no notice. (p. 783.)

J. Kirby, for the appellants.

Boyce & Warren, for the respondent.

399 CORSON, J. This is an appeal from a judgment entered on a directed verdict in favor of the plaintiff. The action was brought upon a promissory note executed by the defendants to the Janney Manufacturing Company, and transferred by that company to the plaintiff. The defendants in their answer set up a warranty on the part of the Janney Manufacturing Company, and claim that the machinery delivered to them was not in compliance with the warranty. It was proven on the part of the plaintiff, and uncontradicted, that before the maturity of the note in suit the same was transferred to the plaintiff bank by the president of the Janney Manufacturing Company, and discounted by the teller of the bank, and the proceeds passed to the credit of the Janney Manufacturing Company, which was indebted to the plaintiff bank in a sum exceeding ten thousand dollars; and it further appeared from a cross-examination of the president and cashier of the bank that the president of the bank was a stockholder in the Janney Manu-

facturing Company and its treasurer, and that the cashier of the plaintiff bank was the secretary of the Janney Manufacturing Company, and also a stockholder therein.

The appellants seek a reversal of the judgment in this case upon four grounds: 1. That the president of the Janney Manufacturing Company was not authorized to transfer the note in controversy to the plaintiff bank, or, at least, that there was no evidence tending to show that he was authorized to make the ⁴⁰⁰ transfer; 2. That there was no evidence showing or tending to show that the teller of the bank was authorized to discount the note and pass the proceeds of the same to the credit of the Janney Manufacturing Company; 3. That the president and cashier of the plaintiff bank, being stockholders and officers of the Janney Manufacturing Company, were charged with notice of any defenses that may have existed against the note in suit in this action; 4. That as the plaintiff bank advanced no new consideration for the note in suit, but gave the Janney Manufacturing Company credit for the proceeds, it could not defeat the rights of the defendants to make their defense to the note. The court evidently being of the opinion that the plaintiff had established by the uncontradicted evidence a transfer of the note to the plaintiff bank before maturity, excluded all evidence on the part of the defendants as to their alleged warranty and breach thereof, and, on motion of the plaintiff, directed a verdict in its favor.

It is contended by the appellants that the president of a corporation is not authorized to transfer a note belonging to such corporation by virtue of his office as president, and that a transfer by him, unless specifically authorized by the board of directors, does not have the effect to transfer the title. It appears in this case that the Janney Manufacturing Company was engaged in the manufacture of agricultural machinery and that much of its business was transacted by way of notes taken by it for machinery delivered, and that it was in the habit of transferring such notes to the plaintiff bank by the indorsement of the president. The Janney Manufacturing Company being engaged in a business in which it received notes from its agents and customers, the president, in the absence ⁴⁰¹ of any evidence to the contrary may reasonably be presumed to be authorized to discount and transfer the notes of the company. In *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859, 62 N. W. 958, this court held: "In the absence of evidence to the contrary, it will be presumed that the managing president of a corporation en-

gaged in loaning money and in buying and selling negotiable instruments has authority, as such, to transfer by indorsement a promissory note made payable to such corporation."

The case of *Mann v. Second Nat. Bank of Springfield*, 34 Kan. 746, 10 Pac. 150, is very analogous to the case at bar. In that case it was contended by the defendant in error that there was no such indorsement or transfer of the note as would convey any interest to the transferee (plaintiff below), and even if there was, that such indorsement or transfer was irregular, informal, and that it would not cut off outstanding equities existing in favor of the defendant below and against the original holder of the note. It appeared from the evidence that the note was made payable to Amos Whitely, president, and was by him indorsed and transferred, before maturity, to the plaintiff in the action. It further appeared that Whitely was the president and manager of the Champion Machine Company, and that the note in fact belonged to that company. Upon these facts, the supreme court of Kansas held it would presume that Whitely, as president and general manager of the Champion company, was authorized to discount and transfer the note in the due course of business: *Merchants' Bank v. Citizens' Gas-light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453, 34 N. E. 1083; *American Exchange Nat. Bank v. Oregon Pottery Co. (C. C.)*, 55 Fed. 265; *Crowley v. Mining Co.*, 55 Cal. 273; *Caryl v. McElrath*, 3 Sand. 176.

⁴⁰² In the case at bar it is further contended by the defendants that the teller of the bank was not authorized to discount the note in suit by virtue of his position as teller, and therefore the acceptance of the note in suit, and discounting of the same by him, and placing the proceeds of the same to the credit of the Janney Manufacturing Company, was not such an acceptance of the note as would prevent the defendants from proving their defense to the same. We are of the opinion, however, that the transaction on the part of the teller was such as he was authorized to make under the custom and business of the bank.

It appeared from the evidence that he was accustomed to accept and place to the credit of parties negotiable notes of such parties as it did business with and were regarded as good, and it further appeared in evidence that the plaintiff bank did a very large business with the Janney Manufacturing Company, in the way of discounting its notes; and that these transactions were often made by the teller in the absence of the cashier, and were recognized and approved by the officers of the bank.

This brings us to the next and more important question, namely, Was the bank, through its officers, charged with the notice of the defendants' defense to the action? It was shown that the president and cashier of the bank had no actual knowledge that there was any defense to the note, and the question is, Can they be held to have constructive notice by virtue of their connection with the Janney Manufacturing Company as its treasurer and secretary? We are of the opinion that to hold that they had such constructive notice would be carrying the principles of constructive notice too far, in order to defeat negotiable paper held by a corporation whose officers hold stock ⁴⁰³ in and of which they are officers.

The Janney Manufacturing Company had its place of business in Iowa. The transaction culminating in the note in suit was had with the appellants at Sioux Falls. The possession of a negotiable instrument payable to order and properly indorsed is prima facie evidence that the holder is the owner thereof, and that he acquired the same in good faith, for value, in the course of business, before maturity, without notice of any circumstances that would impeach its validity, and that he is entitled to its full face value as against any of the parties, except where the note was obtained by fraud, in which case a different rule applies: Comp. Laws 1887, sec. 4487; Manufacturers' Nat. Bank v. Newell, 71 Wis. 309, 37 N. W. 420; First Nat. Bank of Rock Island v. Loyhed, 28 Minn. 396, 10 N. W. 321; Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724; Benton v. German Nat. Bank (Mo.), 26 S. W. 975; Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. 716, 34 L. R. A. 274; Wilson v. Second Nat. Bank (Pa.), 7 Atl. 145; Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 998.

In Manufacturers' Nat. Bank v. Newell, 71 Wis. 309, 37 N. W. 420, the supreme court of Wisconsin says: "The acts of the agent in selling the machine and taking the note were, in legal effect, the acts of the company. This being so, the company must be presumed to have had constructive notice of the infirmity of the note in question. But it does not appear that, prior to its receipt of the note, any of the directors or officers of the bank had any actual knowledge or information respecting such infirmity. The mere fact that some of the directors and officers of the bank were also directors and officers of the company did not import to the bank the same constructive notice as was ⁴⁰⁴ chargeable against the company."

In the case of *First Nat. Bank of Rock Island v. Loyhed*, 28 Minn. 396, 10 N. W. 421, the supreme court of Minnesota says: "Lastly, the defendant contends that the court erred in directing a verdict for plaintiff, because the evidence showed that it was chargeable with notice of defendant's equities against the note when it was discounted. The evidence is uncontradicted that the bank became the purchaser and indorsee of the note before maturity and in the regular course of business, for a valuable consideration; that the business was transacted on the part of the bank by its cashier, J. M. Buford, who had never seen nor heard of the note until it was presented at the bank for discount, and had no actual notice of any defense or equities on the part of the defendant. But defendant insists that because J. M. Buford was a stockholder and director of the B. D. Buford & Co. corporation, therefore he was chargeable with notice, and that notice to him was notice to the bank. It appears also that said J. M. Buford had no duties to perform in reference to this note, either as a stockholder or director of B. D. Buford & Co." But the court held that the bank was protected.

In the case at bar no illegality in the original inception of the note was shown or claimed. In the *Mann* case, *supra*, this same question was considered; and the court, in the course of the opinion, says: "The claim, then, of the defendants, in the light of the facts of the case, is as follows: In other words, the bank must be held to have had constructive notice of the infirmity of the note, not because it or any of its officers or agents had actual notice thereof, or actual notice of any fact which might put them upon inquiry, but because one of its officers was a member of another corporation, which had ⁴⁰⁵ an agent who had actual notice of such infirmity. We think this is carrying the doctrine of constructive notice too far. We think a corporation should be held to have constructive notice of only such facts as have been brought to the actual notice or attention of some one of its officers or agents, or of such facts only as have been constructively brought to the notice or attention of some one of its officers or agents, by the actual notice of such other facts as would naturally put the officer or agent upon inquiry. Why should a corporation be required to take notice of matters or things concerning which not one of its officers or agents has any actual notice? How could its officers communicate to the corporation notice of matters or things of which they themselves have no actual notice? And how, in the present case, could Whitely have communicated to his bank the fact of the

infirmity of the note in suit, when he did not possess the slightest actual knowledge or notice that such infirmity existed?" The views expressed by these courts meet with our approval.

It is further contended by the appellants that the plaintiff is not in the position of an indorsee of negotiable paper before maturity, for the reason that it advanced no money to the Janney Manufacturing Company at the time of the transfer of the note or at any time, and the giving the Janney Manufacturing Company credit for the amount of the note did not place it in a position to defeat the defendant's right to make their defense to the action. It seems to be well settled that the transfer of a negotiable promissory note before maturity in the payment of a pre-existing debt is of itself sufficiently valuable consideration to constitute a transferee a bona fide holder, and to entitle him to protection as against infirmities in the paper of which ⁴⁰⁶ he had no notice: 4 Am. & Eng. Ency. of Law, 2d ed., 285; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Hanold v. Kays, 64 Mich. 439, 8 Am. St. Rep. 835, 31 N. W. 420; Outhwite v. Porter, 13 Mich. 533; Mann v. Second Nat. Bank, 34 Kan. 746, 10 Pac. 150; Naglee v. Lyman, 14 Cal. 451; Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38; Mayer v. Heidelberg, 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; Carlisle v. Wishart, 11 Ohio, 173, 192; Barker v. Lichtenberger, 41 Neb. 751, 60 N. W. 79; Railroad Co. v. National Bank, 102 U. S. 74, 26 L. ed. 61. In the latter case the supreme court of the United States, in considering this question, after commenting at some length on the case of Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865, says: "According to the very general concurrence of judicial authority in this country, as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that, where negotiable paper is received in payment of an antecedent debt, . . . the holder who takes the transferred paper before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper. Upon these propositions there seems at this day to be no substantial conflict of authority." Upon questions of commercial law, it is desirable that the decisions of the state and federal courts should, as far as possible, be in harmony; and in a new state like our own, where the question we are considering has not as yet been

settled by judicial decision, it is proper that the view of the United States supreme court should be followed.

⁴⁰⁷ It clearly appearing in the case at bar that the plaintiff received credit by the bank on its indebtedness to the value of the note, the plaintiff must be considered as an indorsee for value, without notice, and entitled to recover the amount due upon the note, without regard to any defense that may exist in favor of the defendants as against the Janney Manufacturing Company.

Finding no error in the record, the judgment of the circuit court and order denying a new trial are affirmed.

The President of a Corporation is said to be presumed to have authority to indorse a note made payable to it: *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859. See, in this connection, *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453; *City Elec. St. Ry. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 54 Am. St. Rep. 282; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Gould v. W. J. Gould Co.*, 134 Mich. 515, 104 Am. St. Rep. 624.

One Who Acquires Negotiable Paper in payment of, or as security for, a pre-existing debt, is usually regarded as a bona fide holder: *Birket v. Elward*, 68 Kan. 295, 104 Am. St. Rep. 405, and cases cited in the cross-reference note thereto.

WILSON v. CITY OF MITCHELL

[17 S. Dak. 515, 97 N. W. 741.]

MUNICIPAL CORPORATIONS may be Liable upon Implied Contracts if express contracts would be within the powers of the municipality delegated to it, and the city has ratified the act of its officers. (p. 785.)

MUNICIPAL CORPORATIONS—Ratification of Officer's Act. Payment by a municipality of the bill of a city plumber, for connecting, by order of another city officer, a city water main with a well located on private property, which fact was not known to any city officer, is not such a ratification of the act as to render the city liable for the water taken from the well. (p. 786.)

MUNICIPAL CORPORATIONS—Knowledge of Act of Officer.—If a city has no knowledge that a well, connected by a city officer with a city water main, is on private property, it is not liable for the water taken from the well, or for the use and occupation of the property. (p. 786.)

MUNICIPAL CORPORATIONS—Ratification of Unauthorized Act of Officer.—If a municipality has no authority to connect its waterworks system with a well on private property without the owner's consent, it cannot ratify the act of its officer or agent in making such connection without the consent of the owner. (pp. 786, 787.)

MUNICIPAL CORPORATIONS.—Acts of Officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter, or necessarily incident thereto, or indispensable to the proper exercise of the powers granted. (p. 787.)

MUNICIPAL CORPORATIONS—Trespass by Officer—Waiver of.—If a city is not liable for the trespass of its officer in connecting a private well with its water main, the owner of the well cannot waive the tort, and recover for the value of the water taken and the use of the property, in an action against the city. (p. 787.)

E. P. Wanzer, for the appellant.

F. H. Winsor and Preston & Hannett, for the respondent.

518 CORSON, J. The plaintiff brought this action to recover of the defendant the sum of six hundred and ninety-four dollars, the alleged value of the use and occupation of a certain city lot, with an artesian well thereon, belonging to the plaintiff, for a period of about seven years. A verdict was directed in favor of the defendant and the plaintiff has appealed.

At the close of all the evidence the defendant moved the court to direct a verdict for the defendant upon the ground that the undisputed evidence showed that the city did not sink a well upon the lot in question, and did not ratify the act of the superintendent of the waterworks in connecting the city mains with the well, and that there was no evidence in the case tending to prove that the city, at the time that it allowed the bill of the city plumber for connecting the city waterworks with the well, knew that the well in question was upon the lot of the plaintiff, and not upon the city property. The motion was granted, and the motion for a new trial denied.

It appears from the evidence that in 1893 the plaintiff was the owner of the city lot, and artesian well thereon, and that in the latter part of that year the superintendent of the waterworks of said city caused a connection to be made between the city mains and the said artesian well without any contract between the city and the plaintiff, and without the plaintiff's consent. There was no evidence, however, tending to prove that the municipality had any knowledge or notice that the well belonging to the plaintiff had been connected with the city waterworks, other than the fact that the same had been connected by the city plumber by order of the superintendent of the waterworks, and the fact of the allowance by the city of the plumber's bill for doing the work and furnishing the material **519** therefor; but it was not shown that either the superintendent of the waterworks, the city plumber or the city council knew that the

well was upon plaintiff's property. The liability of the city is sought to be maintained upon the ground that the plaintiff's well was connected with the city waterworks under the direction of the superintendent of the same, and that the city used the water for the period above stated. It is also claimed by the appellant that the city is liable, the same as an individual, upon an implied contract, and, therefore, it being shown that the city has used the lot and well thereon during the time stated, the plaintiff is entitled to recover for the use and occupation of the same.

It is undoubtedly true that under the modern decisions a municipal corporation may be liable upon an implied contract, if an express contract would be within the powers of the municipality, delegated to it, and the city has ratified the act of its officers; but the claim that the city ratified the act of the superintendent of the waterworks by allowing the plumber's bill for making the connection is not tenable. There is nothing in the bill itself indicating that the work was for connecting the waterworks with the well upon the plaintiff's lot. The item in the bill claimed to have constituted the ratification of the act of the superintendent of the waterworks reads as follows: "To 11 days' work for city plumber in connecting new well with mains, \$44"; and for thirty-seven days' work assisting same, thirty-four dollars. Only one of the members of the city council was called as a witness, and he testified that, as a member of the finance and waterworks committee, he approved the bill, but at the time he approved it he supposed the work was done upon a city lot. It is well settled that an act of an agent is not ratified unless the principal is ⁵²⁰ fully advised of all the facts connected with the act it is claimed he ratifies: *Shull v. New Birdsall Co.*, 15 S. Dak. 8, 86 N. W. 654. It not being affirmatively shown that either the superintendent of the waterworks or any member of the city council had any knowledge that the city waterworks had been connected with the well belonging to the plaintiff, there was no ratification that can bind the city.

But there is a more satisfactory ground for denying the city's liability. The municipality had no authority to connect its waterworks system with the well of the plaintiff without his consent, and the city officer, therefore, had no authority to invade plaintiff's property, and the city could not legally ratify the act of its agent in making such connection. As the city had no power to enter upon private property and appropriate the same to public use, except in the manner provided by law

for condemnation of such property, the defendant did not have the power to enter upon the lot of the plaintiff and use the same for public purposes without his consent. The acts of the officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter or necessarily incident thereto, or indispensable to the proper exercise of the powers granted: *Sioux Falls v. Kirby*, 6 S. Dak. 62, 60 N. W. 156, 25 L. R. A. 621.

It is contended on the part of the defendant that it was competent for the plaintiff to waive the tort, and sue upon the implied contract for the use and occupation of the premises, and recover the value of such use and occupation. This right might be exercised in the case of an individual, but such a rule has no application to the case of a municipal corporation, as the powers of such corporation are limited, and it cannot exercise ⁵²¹ such as are not expressly granted, or necessarily incident to the power granted. In *Rowland v. City of Gallatin*, 75 Mo. 134, 42 Am. Rep. 395, the supreme court of Missouri, discussing a similar question, says: "Conceding the plaintiff's claim in this regard, and the finding of the court thereon to be correct, still there is no authority in the charter of the city of Gallatin or elsewhere for the officer of the city, in pursuance of an ordinance or otherwise, to enter upon private property, and remove earth or other material therefrom, or in any other manner interfere therewith, for the purpose of improving the streets of said city; and the city cannot, therefore be held liable for the acts charged: *Thomson v. City of Boonville*, 61 Mo. 283; *Hunt v. City of Boonville*, 65 Mo. 620, 27 Am. Rep. 299." In that case the premises of the plaintiff were entered upon by the street commissioner of the city under the verbal direction of the mayor. But as we have seen, the court held that the municipality was not liable. It is true that was an action of trespass, but undoubtedly the same rule would have been held had the plaintiff waived the tort and sued for the value of the material taken from the lot. The basis of the action would have been the trespass committed by the street commissioner. So, in the case at bar, the trespass of the superintendent of the waterworks in connecting the waterworks system with the well of the plaintiff is the basis of this action, for which trespass, as we have seen, the city would not be liable. Waiving the tort, therefore, by plaintiff, and seeking to recover upon an implied contract, does not change the rights of the parties. As bearing upon this question, see *Cavanagh v. Bos-*

ton, 139 Mass. 426, 52 Am. Rep. 716; Seele v. Deering, 79 Me. 343, 1 Am. St. Rep. 314, 10 Atl. 45; Smith v. City of Rochester, 522 76 N. Y. 506; Morrison v. City of Lawrence, 98 Mass. 219; Rowland v. City of Gallatin, 75 Mo. 134, 42 Am. Rep. 395.

We are clearly of the opinion, therefore, that the plaintiff, under the evidence in this case, was not entitled to recover, and that the court below rightly directed a verdict in favor of the defendant. The judgment of the circuit court and the order denying a new trial are affirmed.

A Municipal Corporation is not answerable for the unauthorized acts of its officers: See the monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 405; Nelden v. Clark, 20 Utah, 382, 77 Am. St. Rep. 917; Wendel v. Spokane County, 27 Wash. 121, 91 Am. St. Rep. 825; Sievers v. San Francisco, 115 Cal. 648, 56 Am. St. Rep. 153. That a city may ratify a trespass committed by its officers, and thereby become answerable for the damages caused, see Commercial etc. Power Co. v. Tacoma, 20 Wash. 288, 72 Am. St. Rep. 103.

CITY OF HURON v. WILCOX.

[17 S. Dak. 625, 98 N. W. 88.]

DEEDS—Condition Subsequent.—A deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention upon the part of the grantor to that effect. (p. 790.)

DEED TO CITY—Interest Transferred—Condition Subsequent.—A purchase by, and deed to, a city of land, the city having power to purchase and hold land for its own use, vests an absolute title to the land in the city, although the deed recites that it is "understood" that the land is granted to the city, "for city hall purposes only." (p. 790.)

W. A. Lynch, for the appellant.

A. B. Fairbank, for the respondent.

626 FULLER, J. In support of the complaint in this action to quiet the title to a piece of ground twenty-five feet wide and seventy feet deep, facing west on Wisconsin street, in the city of Huron, plaintiff offered in evidence a grant, bargain and sale deed executed to the city on the twenty-third day of July, 1893, by George W. Sterling and his wife, Mollie B. Sterling, in consideration of twelve hundred dollars, the receipt of which is therein acknowledged. The covenants of seisin and against encumbrances are as follows: "To have and to hold the said

premises with the appurtenances to the said party of the second part, and the said parties of the first part for themselves and their heirs, executors and administrators, do covenant and agree to and with the said party of the second part that they are well seised in fee of the land and premises aforesaid, and have good right and lawful authority to sell and convey the same in manner and form aforesaid; and that the same are free from all encumbrances whatsoever except taxes for the year 1892, and it is hereby understood that said premises are deeded to said party of the second part for city hall purposes only, and further, that the said parties of the first part for themselves and their heirs and all and every other person claiming or to claim by, from or under him or them shall and will from time to time and at all times hereafter make and execute, or cause and procure to be ⁶²⁷ executed, all such further deed or deeds whatsoever for the further and more perfect assurance and confirmation of the said premises hereby granted with the appurtenances unto the said party of the second part as by him or them shall be required, and the above-granted premises in the quiet and peaceable possession of the said party of the second part against all persons claiming or to claim the same or any part thereof the said parties of the first part, their heirs, executors and administrators will warrant and forever defend except as aforesaid and only for the purpose herein mentioned." Claiming to be the owner of a reversionary interest under a deed executed to him by said Sterling and wife on the twenty-third day of October, 1900, the defendant contends that the original transaction was a dedication to the city for a specified public use, and his counsel maintains that such trust estate was never accepted by the municipality, and the dedicators had the right of revocation when they executed the deed to his client.

According to all the authorities, dedication is the deliberate act by which the owner of real property, without remuneration, devotes the fee or a easement therein to the use of the public; and section 1299 of the Civil Code expressly declares that a "sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Now plaintiff, through its proper officials, had power "to purchase, hold, lease, transfer, and convey real and personal property for the use of the city," and the expression, "it is hereby understood that said premises are deeded to said party of the second part for city hall purposes only," serves to show municipal authorization, and may constitute a covenant in the deed

for a breach of which an ⁶²⁸ action for damages is an ample remedy. Clearly, the estate is not qualified by the provision, and the Sterlings parted with every interest in the property. Forfeitures and conditions subsequent not being favored in law, a deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention upon the part of the grantor to that effect. The right is not given to the grantors to re-enter and resume possession in case the premises are not used for city hall purposes, and the expression appears to be merely a declaration of the purpose for which the purchase was made.

Without express words relating to forfeitures or entry, no authority has been found going to the extent of holding a conveyance conditional and subject to divestment that was executed for a valuable consideration, with a covenant or recital that the land conveyed shall not be used for any other purpose than that specified. The following cases are analogous to the one under consideration, and illustrate the proposition that clear language is necessary to create either a condition subsequent or precedent, and that words practically identical with those used in the deed before us create a covenant, but are not sufficient to limit or qualify an estate: *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. 98; *Packard v. Ames*, 16 Gray, 327; *Green v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; *Soukup v. Topka*, 54 Minn. 66, 55 N. W. 824; *Faith v. Bowles*, 86 Md. 13, 63 Am. St. Rep. 489, 37 Atl. 711, *Farnham v. Thompson*, 34 Minn. 330, 57 Am. Rep. 59, 26 N. W. 9; *Weir v. Simmons*, 55 Wis. 637, 13 N. W. 873; *City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90; *Ecroyd v. Coggeshall*, 21 R. I. 1, 79 Am. St. Rep. 741, 41 Atl. 260; *Kilpatrick v. Mayor etc. of Baltimore*, 81 Md. 179, 48 Am. St. Rep. 509, 31 Atl. 805, 27 L. R. A. 643; *Carroll* ⁶²⁹ *County Academy v. Trustees*, 104 Ky. 621, 20 Ky. Law Rep. 824, 47 S. W. 617; *Incorporated Village of Ashland v. Greiner*, 58 Ohio St. 67, 50 N. E. 99; *Hand v. City of St. Louis*, 158 Mo. 264, 59 S. W. 92. In order to qualify the ownership of land by the restriction of its use, as contemplated by section 196 of the Civil Code of 1903, the limiting clause must be connected with the grant in the deed so as to restrict the conveyance and have for its object the rescission, suspension, revocation, or impairment of the estate in case the grantee fails to comply therewith; and there is nothing in the deed before us to justify the implication that anything but the transfer of an absolute es-

tate was intended. The title of the city being thus absolute and unqualified, it is needless to determine whether the clause under consideration is a covenant for the benefit of the grantor or a mere declaration of the purpose for which the property was purchased.

There being no errors of law occurring at the trial, nor merit in the point that the action should be dismissed at plaintiff's cost, the judgment appealed from is affirmed.

A Deed of Land to a Municipality which in the habendum adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent: *Kilpatrick v. Baltimore*, 81 Md. 179, 48 Am. St. Rep. 509. And a prohibitive clause in the habendum of a deed of land to a city, that "no buildings for any other municipal purpose than that of a city hall shall ever be erected on the granted premises," does not, without words of re-entry or forfeiture, create a condition subsequent: *Ecroyd v. Coggershall*, 21 R. I. 1, 79 Am. St. Rep. 741, and see the monographic note thereto on what words create condition subsequent.

BERNARDY v. COLONIAL AND UNITED STATES MORTGAGE COMPANY.

[17 S. Dak. 637, 98 N. W. 166.]

DEEDS—After-acquired Title.—Under a statute declaring that when a person purports, by a proper instrument, to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors, if an entryman on public land conveys it in fee simple before a patent is issued, on the subsequent issuance of the patent to the grantor, the fee passes to the grantee in the deed. (p. 793.)

DEEDS—Want of Consideration.—No consideration is necessary in order to give validity to a deed as between the parties or third persons having notice. (p. 794.)

DEEDS—Conveyance Before Patent—Notice.—Under a statute providing that every grant of real property is conclusive against the grantor, and everyone claiming under him, except a bona fide purchaser or encumbrancer who acquires a title or lien by an instrument first duly recorded, and that the recording and deposit of any instrument for record shall be constructive notice of the execution of such instrument to all subsequent purchasers and encumbrancers, if an entryman on public land conveys it by deed before receiving a patent therefor and such deed is immediately recorded, and after the issuance of the patent the grantor mortgages the land to a third person, the mortgagee is bound to take notice of the record of the deed, and acquires no interest as against the grantee therein. (p. 798.)

French & Orvis, for the appellant.

E. S. Johnson and E. F. Green, for the respondent.

640 CORSON, P. J. This action was instituted by the plaintiff to quiet his title to a quarter section of land in Kingsbury county. The judgment was in favor of the plaintiff, and the defendant has appealed. All the facts in the case were stipulated, and are contained in the agreed statement of facts, which constitutes, in effect, the findings of the court. There are many facts contained in the agreed statement that we regard as entirely immaterial in the determination of this case. All the facts that we deem material are that in February, 1898, William A. Wilkes made a timber culture entry for the premises in controversy; that in May, 1890, said Wilkes and wife and one Wells and wife executed, acknowledged and delivered to the defendant a deed to the premises in controversy purporting to grant to the defendant a fee simple title to the same, and that said deed was duly recorded in March, 1891; that in April, 1895, the said Wilkes received a United States patent for the said premises; that in 1893 Wilkes and wife executed a mortgage upon the said property to one Edgar Smith, which mortgage was foreclosed, and all the title that Smith acquired thereunder, if any, passed by mesne conveyance to the plaintiff.

641 It will thus be seen that the deed to the defendant and the mortgage to Smith were both executed by the same party (Wilkes) prior to the issuance of the patent, and that the Wilkes deed to the defendant was recorded about two years prior to the execution of the mortgage. Wells does not appear to have had any interest in the timber culture claim, and he will not be further referred to. Two questions are therefore presented, and are thus stated in the appellant's brief: "1. Was the deed from Wilkes and Wells to the defendant such a conveyance that any title to the land therein described, afterward acquired by the grantors, or either of them, would, by operation of law, pass to the defendant? 2. Did the record of the deed from Wilkes and Wells to the defendant operate as constructive notice of defendant's right, to the plaintiff, Bernardy, at the time he purchased the land?"

It is provided by subdivision 4, section 947 of the Civil Code, that "where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." This subdivision was copied

from the California Civil Code, and makes an important change in the common law upon the subject of after-acquired titles. In the case of *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449, the supreme court of that state, in an exhaustive opinion, arrives at the conclusion that "the thirty-third section of the act concerning conveyances changes the rule of the common law as to the effect of deeds under the statute of uses upon subsequently acquired interests of the grantor, and gives them an operation equivalent to the most expressive covenant of warranty." The court in the opinion further says: ⁶⁴² "The effect, then, of its provisions upon a conveyance of premises in fee is the same as if it were written upon its face that the grantor conveyed all the estate which he then possessed or which he might at any time thereafter acquire." And the court holds that mortgages are included in the provisions of the section. The thirty-third section referred to was subsequently amended to read the same as the section of our Civil Code above quoted, but the section as amended has been treated by the courts of California as substantially the same in effect as the former section. Mr. Deering, in his *Annotated California Codes*, page 211, volume 2, in a note to section 1106, the same as the section of our code, speaks of the section as a substantial re-enactment of section 33: See, also, *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Lent v. Morrill*, 25 Cal. 500; *Morrison v. Wilson*, 30 Cal. 347; *Kirkaldie v. Larrabee*, 31 Cal. 457, 89 Am. Dec. 205; *Green v. Clark*, 31 Cal. 593; *Cadiz v. Majors*, 33 Cal. 289.

We are of the opinion, therefore, that, as the deed from Wilkes to the defendant did purport to grant the property in fee simple, the after-acquired title of Wilkes passed "by operation of law" to the defendant. Notwithstanding the provisions of the code are clear, definite and certain, and the deed to the defendant is precisely such a deed as the code provides shall pass the after-acquired title "by operation of law," the counsel for the respondent insists that the defendant is not entitled to the benefit of the statute, for the reason (1) that the defendant did not pay any consideration for the property; and (2) that the plaintiff had no constructive notice of the defendant's title when he purchased the same. And this apparently was the view of the court in stating his conclusions of law and entering ⁶⁴³ judgment in favor of the plaintiff. In the view we take of the law, neither of these positions can be sustained. In our opinion, there is nothing in the agreed statement of facts

that warranted the trial court in holding that there was no consideration for the deed from Wilkes to the defendant. But, as we view the case, this is entirely immaterial, as a voluntary conveyance is valid against a subsequent purchaser "with notice, either actual or constructive, of a prior deed." By the Civil Code it is provided: "A transfer is an act of the parties or of the law by which title to property is conveyed from one living person to another. A voluntary transfer is an executed contract subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity": Civ. Code, secs. 915, 916. These sections are copies of sections 458 and 459 of the proposed Civil Code of New York. In their notes to these sections, the commissioners say, in speaking of the clause, "except that a consideration is not necessary to its validity." "This clause was proposed for enactment in regard to grants of real property by the revisers of 1828, but was not enacted. It is, however, undoubted law both as to real and personal property." And this seems to be the general rule in this country as to voluntary conveyances: 6 Ency. of Law, pp. 683, 684. On page 684 the author, under the heading of "Consideration," says: "In the United States, however, it is held that a voluntary deed is valid against any subsequent purchaser who buys with notice, whether the notice be actual, or such as the law implies from the recording of the prior deed." In 14 Encyclopedia of Law, page 466, the author, under the subject of "Fraudulent Sales," says: "In the United States the authorities are almost unanimous in holding that a voluntary ~~644~~ conveyance, if made bona fide, is valid as against a subsequent purchaser with notice of the conveyance." In support of this statement of the law, the author cites a large number of authorities. In *Walker v. Walker*, 35 N. C. 335, the supreme court of that state says: "No consideration is necessary in order to give validity to the deed. . . . The general rule is, a deed is valid without a consideration." In *Jackson v. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266, the supreme court of Michigan held, as appears from a headnote, that "a voluntary deed purporting to be for the beneficial use of the grantee, and made deliberately and without mistake or contrivance, is binding upon the grantor and his heirs, and can be avoided only by creditors and others having superior equities to the grantee." Section 943 of the Civil Code provides that "every grant of an estate in real property is conclusive against the grantor and everyone subsequently claiming under him, except a purchaser or

encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded."

It will thus be seen that the deed from Wilkes to the defendant, being duly acknowledged and recorded, conveyed Wilkes' title to the defendant, not only as against himself, but as against "everyone subsequently claiming under him," except a purchaser in good faith and for valuable consideration, who acquired a title or lien by an instrument that was first duly recorded. It affirmatively appears from the agreed statement in this case that the deed from Wilkes to the defendant was executed and recorded some two years prior to the mortgage executed by Wilkes to Smith, under whom the plaintiff claims. There is nothing in the agreed statement of facts ⁶⁴⁵ that in any manner can be regarded as impugning the good faith of Wilkes in executing the deed to the defendant, and there is no presumption that the conveyance was not made in good faith. It is clear, therefore, that the fact—if such be the fact—that the conveyance from Wilkes to the defendant was voluntary and without consideration gives plaintiff no legal or equitable title to the premises in controversy.

This brings us to the second or more important question, namely, Did the plaintiff, at the time he purchased the property, have constructive notice of the conveyance from Wilkes to the defendant? It is contended by the respondent that as the deed from Wilkes to the defendant was executed and recorded prior to the time the United States patent was issued to Wilkes, and before he acquired a legal title to the property, the plaintiff did not have constructive notice of the same, for the reason (1) that the deed from Wilkes to the defendant was without consideration; (2) for the reason that the plaintiff was not required to examine the record for any conveyance from Wilkes prior to the acquisition of his patent from the United States. This contention is untenable, for, as we have seen, the conveyance from Wilkes to the defendant was good as against him and all persons claiming under him, except creditors, and the title acquired by him by virtue of the patent passed by operation of law to the defendant; and the rule contended for by the respondent, that he was not required to look back of Wilkes' patent, prevailing in some states where the common law is still in force, in which after-acquired titles do not pass to the grantee, has no application under the registry law of this state and the law providing that after-acquired titles

shall pass to the grantee. We shall not stop, therefore, to discuss ⁶⁴⁶ the cases cited, further than to say that they are not uniform in support of the position of the plaintiff, even in states where the common law prevails, and where no provisions have been made for the passing of after-acquired titles by operation of law: *Tefft v. Munson*, 57 N. Y. 97; *Warburton v. Mattox*, Morris, 367.

In the case at bar both plaintiff and defendant, as before stated, claim title from the same grantor, Wilkes; and as we have seen, it was perfectly competent for Wilkes to make a voluntary conveyance of the property to the defendant, and that plaintiff, as a subsequent purchaser, with notice, "actual or constructive," of the deed from Wilkes to the defendant, acquired no title to the property. Section 986 of the Civil Code provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Section 989 provides: "The recording and deposit of an instrument, proved and certified according to the provisions of sections 963, 976, 977, 978, 979, are constructive notice of the execution of such instrument to all purchasers and encumbrances [encumbrancers] subsequent to the recording." It will thus be seen that the recording and deposit of an instrument properly proven is constructive notice of the execution of such instrument "to all purchasers and encumbrancers subsequent to the recording." It is true this section does not, in terms, speak of the instrument duly acknowledged; but it is clear that the legislature had, in effect, provided ⁶⁴⁷ in the previous sections that such instruments, duly acknowledged and recorded, would impart constructive notice. It will be further noticed that the only party who can acquire a title superior to that evidenced by the record is one whose title "in good faith and for a valuable consideration" has first been duly recorded. It will be further observed that no exception is made in the code of conveyances made prior to the acquiring of the legal title when such conveyances are duly recorded. It is therefore quite clear that the plaintiff, at the time he purchased the property, did have constructive notice of the conveyance from Wilkes to the defendant, and is presumed to have had knowledge of the law providing that the subsequent

legal title acquired by Wilkes under his patent passed to the defendant by operation of law. It is clear that the theory that the plaintiff was not bound by constructive notice of the deed from Wilkes to the defendant is entirely inconsistent with our registration act, and our law as to passing subsequently acquired titles. It, in effect, strikes from our code the provisions above quoted in relation to after-acquired titles, for if a party is not required to look beyond the legal title, or is not charged with constructive notice of any conveyance prior to the acquisition of the legal title by the party under whom he claims, the provisions of the code as to after-acquired titles can have but very little, if any, effect.

Let us, for a moment, consider the effect of the theory advanced by the respondent, and apparently adopted by the trial court. A enters upon government land, and conveys the same to B by deed purporting to grant the title in fee simple. Subsequently a patent is issued to A for the land, and, under the theory of the counsel for respondent, A, after the issuance ⁶⁴⁸ of such patent to him, may convey the land to C, who has no actual notice of the prior conveyance to B, and he will acquire a good title to the property as against B, notwithstanding the statute declares that the legal title acquired by A shall pass by operation of law to his grantee, B.

As a further illustration, take the case at bar. Wilkes, so far as the record discloses, has never conveyed or mortgaged the property to anyone since the government patent was issued to him. Suppose that some party who has no actual notice of the mortgage executed to Smith by Wilkes, under whom the plaintiff claims, and assuming that the mortgage was the only conveyance made by Wilkes, purchases the property from Wilkes, and places his deed upon record, and brings an action against the plaintiff to recover possession of the property. Under the plaintiff's theory, such subsequent purchaser would clearly be entitled to recover possession, as he would not be charged with constructive notice of any conveyance or mortgage prior to the issuance of the patent, and the plaintiff would therefore have neither a legal nor equitable title to interpose against the plaintiff's claim. These illustrations sufficiently demonstrate the fallacy of the respondent's theory as applied to our law for the passing of after-acquired titles, and to our registration act. In this state, therefore, a purchaser of property is necessarily charged with notice of all conveyances or mortgages made by the party under whom he claims. It will

be observed, therefore, that under the plaintiff's theory the statute providing that after-acquired titles shall pass to the grantee by operation of law would practically be repealed, and a purchaser from one who has acquired the legal title must examine the record, and ascertain whether or not he has previously ⁶⁴⁹ conveyed the property by a conveyance purporting to convey the fee simple title, as a purchaser is presumed to know the law, and to know that the party in whom the legal title stands may have previously conveyed the property, and that such prior grantee may have acquired such legal title by operation of law under the statute.

Counsel for the respondent have discussed at some length the question as to what extent a party has constructive notice of conveyances not in the line of his chain of title, but, in the view we take, this question has no application to the case at bar, for, as before stated, both plaintiff and defendant claim title under the same party, Wilkes. No question, therefore, is presented as to the notice of any record of conveyances lying outside of the plaintiff's chain of title.

The view that we have taken of the registration laws is strengthened by sections 868 and 869 of the Political Code, which require a numerical index to be kept of both city and farm property. Under such a system, abstracts will necessarily show all the conveyances made of the property.

In our opinion, the propositions advanced by respondent's counsel, and which apparently were sanctioned by the trial court, are calculated to unsettle titles, and are in opposition to rules long established and understood, and which constitute rules of property. Had the respondent made such an examination of the records as men of ordinary prudence would have done, he would have discovered that Wilkes had, prior to the execution of the mortgage to Smith under which the plaintiff claims title, conveyed the property to the defendant, and that the legal title of Wilkes under his patent passed by operation of law, under the statute, to the defendant, and that Wilkes, ⁶⁵⁰ at the time he mortgaged the property to Smith, had no interest in the property to mortgage, and that Smith acquired no title to the property by reason of his mortgage and the foreclosure of the same, and that he, in purchasing, would acquire no title to the property.

The judgment of the circuit court is reversed and a new trial ordered.

Mr. Justice Fuller Dissented, and said: "The facts omitted from the majority opinion as immaterial, and which I deem conclusive of the questions of law presented, are these: On the ninth day of December, 1882, Oliver L. Taylor, a pre-emptioner, obtained a receiver's final receipt, which was duly recorded six days later, when he mortgaged the premises described therein for three hundred and ninety-four dollars, and appellant became the assignee of such mortgage more than one year after the entry of the pre-emptioner and mortgagor had been canceled by proper authority at the general land office of the United States. Three and one-half years before the cancellation of his entry, Taylor conveyed the mortgaged premises by warranty deed to William A. Wilkes and Kollin J. Wells, and eighteen months after the cancellation of such entry, and four months after the assignment of the Taylor mortgage to appellant, it obtained from Wilkes and Wells the warranty deed relied upon. Respondent's source and chain of title emanates from the United States, and is traceable thus: William A. Wilkes placed a timber culture filing on the land in controversy about seventy-five days after Taylor's entry was canceled, made final proof on the second day of August, 1893, and received a patent from the government April 27, 1895, since which date all taxes have been paid by respondent and his grantors. After making final proof, Wilkes and his wife mortgaged the land for four hundred dollars, under date of August 11, 1893, to Edgar L. Smith, who obtained a sheriff's deed on the third day of November, 1897, by virtue of a valid statutory foreclosure of such mortgage. On the twenty-third day of August, 1898, Smith and wife conveyed the property, for a valuable consideration, to Alpha D. Cadwell, by a warranty deed containing the covenant that 'the premises are free from encumbrances since the issuance of the patent from the United States,' and, for a valuable consideration, Cadwell and wife conveyed on the seventh day of September, 1898, by the usual warranty deed, to C. C. Hortman, who, together with his wife, executed and delivered to respondent a warranty deed dated March 13, 1899, in which the grantors covenant that the premises are free from all encumbrances since the issuance of the patent, except the taxes of 1898 and a mortgage for five hundred dollars, all of which was assumed by respondent, and subsequently paid in full and satisfied of record. Before obtaining the Taylor mortgage or the deed from its grantees, Wilkes and Wells, appellant knew that the title, both legal and equitable, was in the United States; and the doctrine of after-acquired title, being in the nature of an equitable estoppel, should never be applied as against a purchaser in good faith for value, in favor of a gratuitous grantee not influenced by the recitals in his deed. Without determining whether the extinction of the Taylor interest relates back to the date of the pre-emption filing, or merely takes effect as of the date his entry

was canceled, there is no escape from the conclusion that the cancellation of the entry imparted constructive notice to both grantors and the grantee that neither party had an interest in or lien upon the property when the deed was executed. It being shown by the undisputed evidence that the only consideration for such conveyance was the satisfaction of a mortgage rendered void by the cancellation of the Taylor entry, the inference is irresistible that nothing was paid for the deed, and the trial court is justified in its conclusion that appellant is not a bona fide purchaser of the land. Valuable consideration, absence of notice, and presence of good faith are the essential attributes of a bona fide purchaser: *Citizens' Bank v. Shaw*, 14 S. Dak. 197, 84 N. W. 779.

“As neither Taylor, the mortgagor, nor his grantees, Wilkes and Wells, possessed the slightest interest in the property, a sheriff's deed upon foreclosure would convey no estate, and nothing is gained or lost by the satisfaction of a mortgage absolutely void. Mitigation of damages arising from a breach of warranty, and sustained by a bona fide purchaser, being the only reason for passing after-acquired title by operation of law, one who obtains his deed without any consideration whatever suffers no injury, and is not entitled to invoke the doctrine as against the grantees of Smith, in favor of whom the after-acquired title of Wilkes inured. As previously stated, Taylor, against and under whom appellant claimed a mortgage lien and estate by virtue of the deed from such entryman's grantees, never obtained a patent; and, at the time appellant became the assignee of the mortgage and grantee of the premises, the entry, which was the only foundation for its claim of title, had been duly canceled.

“It is settled law that ‘parties who purchase of pre-emptors before patent cannot maintain the position of bona fide purchasers, as they purchase only an equity. They take only such title as the vendees of the government had, and purchase subject to the action of the land department upon the entries, either in confirming or canceling them’: *Whitaker v. Southern Pac. Ry. Co.*, 2 Copp. 919; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. ed. 668; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Arnold v. Grimes*, 2 G. Greene, 77.

“It is stipulated by the parties to the action that respondent purchased the premises for a valuable consideration, and it is quite apparent that his title was acquired without any notice of the deed upon which appellant relies.

“In discussing the proposition that the registration of an instrument anterior to, outside of, and not connected with, the purchaser's chain of title, is insufficient to charge him with constructive notice, Mr. Pomeroy says: ‘If two titles to the same land are distinct and conflicting, the superiority between them depends, not upon their being recorded, but upon their intrinsic merits. It is settled doctrine, therefore, that a record is only a constructive notice

to subsequent purchasers deriving title from the same grantor. Intimately connected with, and, indeed, a branch of, this same doctrine, is the question, How far back is a purchaser bound to search the record title of his own vendor? If the records show a good title vested in the vendor at a certain date, and nothing done by him after that time to impair or encumber the title, it would seem that the policy of the registry act is thereby accomplished. The purchaser is protected. He is not bound to inquire further back, and to ascertain whether the vendor has done acts which may impair his title prior to the time at which it was vested in him, as indicated by the records. This view is supported by many decisions—it seems by the weight of authority—which hold that a purchaser need not prosecute a search for deeds or mortgages made by his own vendor further back than the time at which the title is shown by the records to have been vested in such vendor, or, in other words, a purchaser is not bound by the registry of deeds or mortgages from his vendor made prior to that time': 2 Pomeroy's Equity Jurisprudence, 658. The following cases are to the effect that a valid government patent vests in the patentee an absolute, unconditional right to the land, and that a deed lying outside of a purchaser's chain of title derived therefrom imparts no notice: Rankin v. Miller, 43 Iowa, 11; Tydings v. Pitcher, 82 Mo. 379; Ford v. Unity Church, 120 Mo. 498, 41 Am. St. Rep. 711, 25 S. W. 394, 23 L. R. A. 561; Harper v. Bibb, 69 Am. Dec. 397; Farmers' Loan and Trust Co. v. Maltby, 4 N. Y. Ch. 462; Losey v. Simpson, 11 N. J. Eq. 246; Warner v. Sibley, 53 Mich. 371, 19 N. W. 40.

"In the case of Rankin v. Miller, 43 Iowa, 11, the court says: 'To entitle one to recover ownership of lands upon the ground of superior equity in himself, he must have some right other than the acquisition of a void title in ignorance of the rights of another. . . . The patent for lands belonging to the United States, when issued to a party, vests in him the perfect legal title, which relates back to the time of entry of the land. The entry of the land and the issuing of the certificate transferred to him at the time all the property held by the government in the land, and conferred upon him all equity therein.'

"In the present case it subverts the purpose of our registration law, and is utterly absurd, to require respondent, in the interest of a grantee who gave nothing and got nothing, to extend his search beyond the patent from the United States, by virtue of which his grantors acquired perfect title. By the sheriff's deed, Smith acquired the absolute title of the mortgagor, and the deed from Cadwell to Hortman contains nothing but the usual covenants of warranty. If it were necessary, the familiar doctrine that a grantee with notice, who takes from a grantor without notice, takes also

without notice, might be invoked in respondent's behalf. Under the rule that an innocent purchaser without notice cannot be deprived of any of the inherent qualities of his property, including an absolute right to alienate his entire estate, his grantee with notice is fully protected in the acquisition of the title purged of all equities, not on its own merits, but on account of being the successor of a bona fide purchaser: *Van Syckel v. Beam*, 110 Mo. 589, 19 S. W. 946; *Paul v. Kerswell*, 60 N. J. L. 273, 37 Atl. 1102; *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351; *Bruen v. Dunn*, 87 Iowa, 483, 54 N. W. 468; *La Fleur v. Chace*, 171 Mass. 59, 50 N. E. 456; *Buck v. Foster*, 147 Ind. 530, 62 Am. St. Rep. 427, 46 N. E. 920.

“Appellant is guilty of gross laches, and it seems to me that my associates have overlooked the equitable principles which fully justify the action of the trial court. The judgment appealed from ought to be affirmed.”

Any Title Acquired after the execution of a deed or mortgage of public lands inures to the benefit of the grantee or mortgagee under the statute of California concerning conveyances: *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205. And, according to *Ford v. Unity Church Soc.*, 120 Mo. 498, 41 Am. St. Rep. 711, if a deed of gift contains words purporting to convey the property in fee simple, any title subsequently acquired by the grantor will vest in the grantee as against subsequent purchasers having notice of such deed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BINGHAM v. WELLER.

[113 Tenn. 70, 81 S. W. 843.]

DEED to Married Woman and Body Heirs.—A conveyance of land to a married woman and “her body heirs” vests a fee simple in her, but no estate in her children. (p. 807.)

DEED to Married Woman—Estate by Curtesy.—A conveyance of land by a third person to a married woman, to be held by her as her separate estate, with full power of disposition, does not deprive her husband of an estate by curtesy therein after her death. (pp. 807, 808.)

HUSBAND AND WIFE—Conveyances Between.—A conveyance of land by a husband to his wife creates a separate estate in her, and divests him of all interest, present or contingent, in the land, and he is not entitled to an estate by the curtesy therein upon the death of his wife. (p. 809.)

H. Craft, for the complainants.

Turley & Turley, for the defendants.

⁷¹ **WILKES, J.** Mrs. S. W. Bingham filed the bill in this cause against her father, Jacob Weller, to have her rights and interests in two pieces of property in the city of Memphis declared, to recover this interest, and also her share of the rents and income which have been collected from said property by her said father. Her father, Jacob Weller, claims that he is entitled to the possession of the property as tenant by the curtesy of his wife, Caroline Weller, who died in July, 1899.

There are two pieces of this property, one known as ⁷² the “Main Street” and the other as the “Beale Street” property.

On the 20th of February, 1851, H. B. Joiner conveyed to Mrs. Caroline Isabella Weller and her bodily heirs, forever,

a certain piece or parcel of land on Market street, in Memphis, Tennessee, to be held by her to her own bodily heirs, free from the debts and liabilities of her husband, Jacob Weller. At that date Mr. and Mrs. Weller had two children living, to wit, Sarah W. and ———.

On the 10th of October, 1857, they had four children living, to wit, Sarah W., John J., Henry Clay and Robert F., and all of them at that time were minors. At that date Jacob Weller and his wife, Caroline I., and the four minor children above named, by their next friend, John S. Erwin, filed their *ex parte* petition or bill in the chancery court at Memphis, setting up the purchase by Jacob Weller of this lot, and stating that it was conveyed to Caroline Weller, and her bodily heirs. The deed from Joiner is made an exhibit to the petition, and shows that the land was conveyed to Caroline I., and her bodily heirs, as before stated. The petition prayed that the Market street property might be sold, and the proceeds reinvested in other property, or loaned out under the direction of the court. It also asked the court to construe said Joiner deed, and determine the amount of interest or title in said Market street lot acquired by the said Caroline I. and her four children, who were parties thereto.

⁷³ In these *ex parte* proceedings, on the 12th of January, 1858, a decree was entered adjudging that under the Joiner deed the children of Caroline I. Weller took an estate and interest in common with her in the Market street property, and the cause was referred to the clerk to report whether it was manifestly to the interest of the said Caroline I. and her minor children that the Market street lot should be sold, and proceeds invested in other property, or loaned out under the direction of the court. The clerk and master reported that it would be manifestly to the interests of the parties, and especially of the children, to sell the property, and invest the proceeds in other property, or loan it out at interest, as the court might order. This was confirmed by the chancellor, and it was again adjudged that Caroline I. and her children, named in the petition, held the Market street property in common, and directing it to be sold. This decree was renewed on June 16, 1858, and again on January 22, 1859.

On November 28, 1859, an order was entered showing that petitioners had dismissed their petition. Nothing further appears to have been done until the November term, 1865, when a decree of sale was renewed.

On February 2, 1866, the clerk and master reported that General W. Y. C. Humes had offered to give eleven thousand dollars for the Market street property, and on the 3d of February, 1866, the clerk reported that the offer was a good one, and ought to be accepted. ⁷⁴ No further step appears to have been taken in the case.

On the 20th of February, 1868, Jacob Weller, the husband, filed his original bill against his wife, Caroline I. Weller, and their minor children, J. J. Weller, Sarah W., Henry Clay, Robert F., Caroline I., and Forrest L. Weller. The bill alleged that this Market street property was conveyed by Joiner to Caroline I. Weller to her sole and separate use, and to the heirs of her body. It made the ex parte proceedings a part of the bill, and referred to the deed as being on file in that case. It set out that the Market street property could be sold for eleven thousand dollars, and prayed that it might be sold, and the proceeds reinvested by Jacob Weller in other city property, upon the same trust as was set out in the deed from Joiner, heretofore referred to. A decree was entered directing a sale of the property for eleven thousand dollars, upon proof and report of the clerk and master that it was to the interest of the parties that the sale should be made. The sale was ordered to be made by Jacob Weller as special commissioner, the minimum price to be eleven thousand dollars.

On the 21st of July, 1866, Jacob Weller reported to the court that he had sold the Market street lot to Alston, and this sale was confirmed, and title to the Market street lot was vested in him, and the commissioner was ordered to report to the next term of the court what disposition he had made of the money.

On the 19th of January, 1869, he reported that ⁷⁵ he had used eight thousand one hundred and nine dollars in the purchase of a lot on the north side of Beale street, and that by mistake he had taken the title to himself, instead of to his wife and children, and he preferred to convey the Beale street lot to his wife and children, to hold just as they held the Market street lot, or, in lieu thereof, to convey to them the Main street lot, which at that time belonged to him, to be held in the same way by his wife and children. This report sets out that the Main street lot was more valuable than either the Market street lot or the Beale street lot. This report was confirmed on January 16, 1869, and the cause was referred to the clerk to report whether it would be best to invest the proceeds in the Main street lot or in the Beale street lot. The clerk

and master reported that the Main street lot was the better investment, and should be made. This report was confirmed on the 10th of February, 1869, and it was ordered that the Main street lot should be taken and accepted as an investment of the Market street property. And it was further ordered that all right, title and interest of the said Jacob Weller in said Main street lot should be divested out of him, and vested in said Caroline I. Weller and her children by the said Jacob Weller in like manner as they owned the Market street property under the deed from Henry B. Joiner, and that the title be vested in them and their assigns, forever.

During the pendency of this case Henry Clay and Robert F. died intestate, and without children. Caroline ⁷⁶ I. Weller has died, leaving her husband, Jacob Weller, and the four children—Mrs. Bingham, John J., Caroline I. and Forrest L.

It is insisted on behalf of Mrs. Bingham that the last proceeding in the court to which we have referred vested the title to the property in Caroline I. Weller and her two children, Mrs. Bingham and John J. Weller, who were alive at the time the deed was made by Joiner in 1851; and hence Mrs. Weller, the mother, and Mrs. Bingham and John J. Weller, were entitled to a one-third interest in common in the Market street property, and upon the death of her mother she inherited one-fourth of her one-third interest so that her interest in the property is five-twelfths of the same.

The argument is that the decree of the court construing the deed of Joiner to Mrs. Weller adjudged that the title to the lot was vested in Mrs. Weller and her children, and all the parties in interest being before the court in that case are bound by its decrees construing the deed and fixing the right of the parties.

The chancellor, in his decree in the present case, however, adjudged that the title to Market street property was vested in Caroline I. Weller in fee simple.

The construction contended for by Mrs. Bingham cuts out the after-born children from any interest in the property, and also cuts out the husband from any interest as tenant by curtesy.

We are of opinion that the language used by the chancellor in fixing the rights of the wife and children of ⁷⁷ Jacob Weller in the Main street property intended to place the title and interest in the property exactly as it existed under the deed from Joiner to Caroline I. Weller to the Market street property. The decree is confusing and contradictory in its terms,

in that it vests the title in the Main street property in the wife and children of Jacob Weller, to be held by them, their heirs and assigns; but it further provides that they should hold it and own it in like manner as they owned and held the Market street property under the deed from Joiner to them. Now, the deed from Joiner to Caroline I. Weller recites that the property is conveyed to Caroline I. Weller and her "body" heirs; and under the uniform course of our decisions this vested a fee simple estate in Caroline I. Weller, and vested no estate in her children: *Middleton v. Smith*, 1 Cold. 144; *Kirk v. Ferguson*, 6 Cold. 483; *Wynne v. Wynne*, 9 Heisk. 309; *Owen v. Hancock*, 1 Head, 563.

Under these contradictory terms of the decree, we are of the opinion that the court intended to vest the title to the Main street lot in Caroline I. Weller in fee simple, just as she took title to the Market street lot under the Joiner deed.

It follows that upon the death of Caroline I. Weller, her husband, Jacob Weller, became entitled to an estate by curtesy in the Main street lot; and that, subject to this curtesy interest, the estate vested in the heirs of Mrs. Caroline I. Weller, but no estate vested in them until her death, and then only as her heirs.

⁷⁸ As to this feature of the case the decree of the chancellor is reversed and modified so as to give to Jacob Weller a curtesy interest in the Main street lot or its proceeds.

The title to the Beale street lot was vested in Caroline I. Weller, by deed from her husband, Jacob Weller, executed April 10, 1876. The husband conveys this property to the wife to her sole, separate and exclusive use as a separate estate, free and discharged from all his control and liabilities, but with full power to her to sell, convey or mortgage the same at her pleasure. The habendum recites that she is to have and to hold it as separate estate as above stated, with power of alienation, and it contains a general warranty.

It is insisted for complainant that the terms and the language of this deed deprive her husband, Jacob Weller, of any interest in the estate, both during the life of the wife and after her death.

In the answer filed in this case two of the children—Carrie I. and Forrest L.—set out over their signatures that they desire their father, Jacob Weller, to retain possession of this Beale street lot, and receive the rents therefrom as long as he lives.

It has been held by this court that a deed made by a third

person to the wife, her heirs and assigns, forever, to be free from the control and liabilities she may hereafter have, with full power to dispose of the same at all times as she deems proper, does not deprive the husband of this curtesy estate in such property after her death: ⁷⁹ *Carter v. Dale, Ross & Co.*, 3 Lea, 710, 31 Am. Rep. 660; *Frazer v. Hightower*, 12 Heisk. 94; *Baker v. Heiskell*, 1 Cold. 641.

Clearly, there is nothing in this deed to deprive the husband of his curtesy interest in this land if the deed had been made by a third person; and this is virtually admitted. But it is said that, inasmuch as the deed was made by the husband to the wife, a different rule prevails.

The case of *Barnum v. Le Master*, 110 Tenn. 638, 75 S. W. 1045, is cited to sustain this contention. In that case the court undertook to say what effect should be given a deed from the husband to the wife, and the court held that it should be held to pass to the wife the highest estate that the husband could convey. In the course of the opinion the court uses language as follows: "If a transfer of personal property to the wife by the husband did not, of its own force, vest in her a separate estate, the transfer would be a farce, and perhaps a fraud upon her, because the husband would immediately become again the owner of it by virtue of his marital rights, and the wife would take nothing. If the same result did not follow a conveyance of land by a husband to his wife, he would, by the same marital rights, become seised of an estate therein during their joint lives; and, if they have a child born alive, for his life, if he survives her, as tenant by the curtesy."

It is admitted that in that case the husband and wife were both alive, and he could not, therefore, be tenant ⁸⁰ by the curtesy; and it is said that the question as to the right of the husband to curtesy, after the wife's death, was not involved in that case.

In *Frazer v. Hightower*, 12 Heisk. 94, the husband had conveyed to a trustee for his wife certain lands; and the question was whether the husband, after the death of the wife, took an estate by curtesy in the lands so conveyed to the trustee. In that case it was said: "By a fair construction, then, we think that, while Daniel Hightower, by this deed, did surrender to his wife, during coverture, the rents, profits and possession of this land, yet, as we have already said, he made no settlement of the estate beyond her lifetime. The death of the wife renders the tenancy by the curtesy consummate or complete. In-

asmuch, therefore, as this deed makes no settlement of the land in the event of the wife's death, but provides only for dominion and control over it during coverture, the husband thereby abridged his estate for that period only, and, having survived her, he is entitled to take as tenant by the curtesy. We see no reason why he shall not be taken to have intended, when he made this conveyance to his wife, that she was to hold the estate as every estate of inheritance is held by a wife; that is, subject to curtesy."

Referring again to the case of *Barnum v. Le Master*, 110 Tenn. 638, 75 S. W. 1045, the court said, in support of its holding that "otherwise the wife would not only be deprived of all the fruits of ownership during all this time (that is, during the marital relation), but she could not sell or convey it without ⁸¹ his consent and joinder in the conveyance. A power in the husband over the disposition of the property often enables him to control and reacquire title by reducing to possession the proceeds of the sale of it. The wife would acquire a bare right to sell with the concurrence of her husband while he lived, and only comes into full ownership and enjoyment in the event she should survive him. An estate more in the nature of a remainder than an absolute one taking effect immediately, which the deed purports to pass, and wholly inconsistent with the terms of the instrument."

We are of opinion that the conveyance of real estate by the husband to the wife should have the same effect as the gift or transfer of personal property; that is, to divest out of the husband all interest, present or contingent, in the land; and upon the death of the wife the real estate should go to the devisees of the wife, if she make a will; and, if she die intestate, to her heirs, free from any claim on the part of the husband for curtesy or other interest; and that the case of a conveyance from a husband to the wife of real estate must, to this extent, be distinguished from a conveyance by a third person to the wife for her separate estate.

This case is distinguishable from the case of *Carter v. Dale, Ross & Co.*, 3 Lea, 710, 31 Am. Rep. 660, which was a conveyance from a third person to the wife, and not from the husband.

This case is distinguishable also from the case of *Frazer v. Hightower*, 12 Heisk. 94. In the latter case ⁸² the conveyance was in trust for the wife, and the court construed the language of the conveyance to indicate that the object of the

husband was merely to secure to the wife the rents and profits of her real estate during the marital relation, and no longer.

The decree of the chancellor as to the Beale street property is also reversed, Jacob Weller having no interest therein or claim thereon.

The costs of appeal will be paid equally by complainants and defendants, and of the court below as directed by that court, and the cause is remanded for further proceedings under this holding and the agreements of parties heretofore made, as shown by the record.

A Husband may be Tenant by the Curtesy in his wife's separate real estate, notwithstanding he is cut off from any participation in the rents and profits during coverture. But if the purpose to cut him off from the curtesy be clearly expressed in the instrument of settlement, then the right is gone: *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660. See, too, *Cochran v. O'Hern*, 4 Watts & S. 95, 39 Am. Dec. 60; *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758.

BARRON v. CITY OF MEMPHIS.

[113 Tenn. 89, 80 S. W. 832.]

EMINENT DOMAIN—Taking of Property.—A taking of private property for public use requiring just compensation to be made therefor, exists when the property is actually appropriated by the state or one of its agencies, or the common and necessary use of the property is seriously interrupted. (p. 811.)

EMINENT DOMAIN—Taking of Property.—If a municipal corporation enlarges a pier supporting one of its bridges to enable the pier to bear the additional weight of a city sewer, and thereby diverts the current of the stream, so as to overflow and destroy private property and undermine the support of a house standing thereon, there is such a taking of private property for a public use as to require just compensation to be made therefor. (p. 813.)

CONSTITUTIONAL LAW—Eminent Domain.—The legislature has no power to authorize the taking of private property for a public use without just compensation. (p. 813.)

Bell, Terry & Bell, for the plaintiffs.

W. B. Henderson, for the defendant.

90 BEARD, C. J. This is an action in the nature of trespass on the case to recover damages for injuries alleged to have been inflicted by the city of Memphis on the property of Mrs. Venorah Barron. The suit was brought by her and her hus-

band. Upon the trial a demurrer interposed by the defendant below to the evidence of plaintiffs was sustained. To this action of the court plaintiffs assign error.

The testimony discloses that Mrs. Barron is the owner of a lot in the city of Memphis, the rear of which extends to and is bounded by Bayou Gayoso, a stream which passes through the city and discharges into the Mississippi river. Over this stream, and near the property of Mrs. Barron, a bridge has been standing for many years. The center of this bridge was supported by a stone pier. ⁹¹ Some time before the institution of this suit, under the direction of the municipal authorities, this central pier was extended or enlarged in order that it might bear the additional weight of one of the city's sewers. In making this extension the pier was so constructed that it stood, when completed, at a small angle across the channel of the stream. The result was to divert the current of the bayou and throw it across the lot of Mrs. Barron, so that by a process of erosion a large part of it has been destroyed. To such extent did this injury go that the pillars of a house standing on the lot were undermined and to relieve it from threatened destruction the house was moved by plaintiffs in error.

Upon these facts it is maintained by the owners that there was a taking of Mrs. Barron's property within section 21 of article 1 of the constitution of Tennessee, which is in these words: "No man's property shall be taken or applied to public use without just compensation."

To put this provision in operation, it is not essential that there should be an actual appropriation of the property taken to the public use. "It is enough if any right of the owner respecting the thing owned be impaired so that he cannot apply the thing to all the uses of which it was formerly capable": Taylor on Corporations, sec. 173.

Mr. Wood is in accord with this statement of the rule. In his work on Nuisances (section 762) he says: "Whenever the exercise of right (asserted) operates to ⁹² destroy an easement incident to real property, or amounts to an actual physical invasion of property by some agency that produces injury thereto or imposes a burden thereon, this is a taking of property."

The texts of these authors are supported by a citation of many cases, and we think it may be safely stated that, even in the absence of the appropriation by the government, or one of its agencies, to a public use, yet if, in carrying on its work, it seriously interrupts the common and necessary use of the property

by its owner, this is a taking within the meaning of the constitutional provision. Much more so must it be when by the act of the government the invasion amounts to a practical destruction of a part of the whole of the property.

As was said by the supreme court of the United States in *Pumpelly v. Canal Co.*, 13 Wall. 166, 20 L. ed. 557: "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, . . . it shall be held that, if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction—without making any compensation, because in the narrowest sense of that word it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as these stood at common law, instead of the government, and making it an authority for invasion of private right under the ⁹³ pretext of the public good." So in that case it was held where persons, authorized by an act of the legislature of Wisconsin to construct a dam across an outlet of Lake Winnebago, in doing this work threw the waters of the lake so as to render of little value the land of an adjoining proprietor, that this was a taking within the constitutional provision of that state. The same rule was announced with regard to facts similar in *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41, *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147, and in *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117.

But it is unnecessary to resort to cases determined by other courts for the purpose of finding illustrations of the application of this rule, as our own reports furnish authority for the contention of plaintiffs in error; cases in which this court has given an interpretation of this provision sufficiently liberal to protect owners from any direct or indirect invasion of their property rights.

In *Telegraph Co. v. Electric etc. Co.*, 93 Tenn. 492, 29 S. W. 104, a telephone company sought to recover from a street railway corporation compensation for injuries received from an overflow of electricity from the latter's works to the practical destruction of the works of the former, and it was ruled that this was a taking for which the telephone company was entitled to compensation. In dealing with this phase of the case the court said: "The injury by 'conduction' is a taking of the property of the telephone company by the street railway ⁹⁴ company within the constitutional provision requiring compensation to be

made for private property taken for public use. It imposes a burden upon the telephone company's property that impairs its use and value. The loss is fixed and definite in amount. It makes no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid. The important consideration is that a thing of value has been taken from the telephone company for the benefit of the street railway company, as the representative of the public, and for that thing compensation must be made."

In *Hamilton County v. Rape*, 101 Tenn. 222, 47 S. W. 416, it was held the impairment or destruction of the right of ingress or egress of adjoining property by a change of grade in a public highway, under the authority of the county, was a taking of property for which its owner was entitled to compensation.

Other cases in our state might be referred to, but these are sufficient to the present purpose. We think, if the serious interference with the telephone service as the consequential result of electricity in the first, and the impairment of the right of ingress and egress in the last of these cases entitled the property owner so injured to compensation, a fortiori it would follow that, where property is invaded, and to a great extent destroyed, by a government agency, as in the present case, ⁹⁵ its owner can invoke the protection of the provision of the constitution in question.

But it is insisted that the city of Memphis is protected by reason of an act of the legislature (Sess. Laws 1881, c. 96, p. 111) exempting taxing districts, of which the city of Memphis was one, from liability in certain cases, and the case of *Williams v. Taxing Dist.*, 16 Lea, 531, is relied on for this contention. To this it is sufficient to say, if it be conceded that this act is still operative for the protection of the city of Memphis, and if it was necessary to hold that such an action as is complained of in this case falls within its terms, it then would be equally necessary for this court to hold it to that extent unconstitutional; for "the legislature has not the power . . . to authorize the taking of private property for a public use without compensation": *Telegraph etc. Co. v. Electric etc. Co.*, 93 Tenn. 492, 29 S. W. 104; *Taylor on Corporations*, sec. 173.

So it follows that *Williams v. Taxing Dist.*, 16 Lea, 531, gives no color to the insistence of the defendant in error in the present case.

The judgment of the court below is reversed, and the case is remanded for the ascertainment of damages.

The Permanent Flooding of Land by the erection or construction of artificial obstructions in a natural watercourse amounts to a taking of the land, within the constitutional provision that private property shall not be taken for a public use without just compensation: See the monographic notes to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 611; *Sheehy v. Kansas City Cable Ry. Co.*, 4 Am. St. Rep. 404; and the subsequent cases of *In re Minnetonka Lake Improvement*, 56 Minn. 513, 45 Am. St. Rep. 494; *Yazoo etc. R. R. Co. v. Davis*, 73 Miss. 678, 55 Am. St. Rep. 562.

HARRELL v. SPEED.

[113 Tenn. 224, 81 S. W. 840.]

TAXATION—Implements of Interstate Commerce.—Steamboats belonging to a corporation and used in transporting freight and passengers between different states, may be taxed in the state of incorporation, at the home port of the corporation, and their situs when at rest. (p. 815.)

TAXATION—Implements of Interstate Commerce.—One state can neither impose a tax upon the capital stock of a corporation of another state, nor upon its boats engaged in interstate commerce, and making only temporary landing within the state, nor can it impose a privilege tax for carrying on the business of such interstate commerce. (pp. 815, 816.)

INTERSTATE COMMERCE—Intoxicating Liquors—Privilege Tax.—The imposition of a privilege tax for selling intoxicating liquors on steamboats engaged in interstate commerce while at landings within the jurisdiction of a state is a valid and proper exercise of its police power. (pp. 816, 817.)

INTOXICATING LIQUORS—Importation—State Regulation.—The importation or sale of intoxicating liquor, whether in the original or broken packages, is subject to the legislation of the state into which they are imported, stored, or sold. (p. 820.)

Randolph & Randolph, for the plaintiff.

C. T. Cates, attorney general, and C. D. M. Greer, for the defendant.

226 BEARD, J. This case is before us on an agreed statement of facts, from which it appears that the West Memphis Ferry Company is a corporation duly created under the laws of the state of Arkansas, having its situs at West Memphis, in the county of Crittenden, in that state, on the western bank of the Mississippi river; that the corporation, by its charter, has a right to own and use water craft on that river, and for three years, under the license duly and legally issued to it by the county of Crittenden, it has been operating ferryboats across

the ²²⁷ Mississippi river, carrying passengers and freight from West Memphis, and landing at its dock at the wharf at the city of Memphis, in this state, where it would discharge the same, and take on other passengers and freight for transport to its home port and one or two other ports in the state of Arkansas; that a bar was maintained on each of its boats, where liquors were sold; and that the privilege of keeping the bar on one of these boats was rented to Harrell, the plaintiff in error, who had been, and was, engaged in selling intoxicants by retail to passengers on its boats, and such other persons as happened to come on board, and desired to make purchases thereof.

For the exercise of this privilege, the state of Tennessee, through a proper officer, required Harrell, under the menace of a distress warrant, to pay the license tax which it was insisted was due under that portion of section 4 of chapter 257, page 615, of the acts of 1903 which reads as follows: "Persons selling beer or any quantity of liquor on steamboats, flatboats or any other vessel or water craft or from railroad cars shall pay a tax, each in lieu of all other taxes, to be paid in any county they may elect, per annum two hundred dollars." This payment was made under protest, and the present suit was brought to recover the money so paid, upon the ground that it was illegally exacted.

That the steamboats used by the West Memphis Ferry Company in carrying on its business of transporting freight and passengers could be taxed in the state of ²²⁸ Arkansas, at the home port of the company, and their situs when at rest is settled in *Cincinnati Transp. Co. v. Wheeling*, 99 U. S. 273, 25 L. ed. 412. It is also settled that the state of Tennessee could neither impose a tax on the capital stock of this ferry company, incorporated as it was by the state of Arkansas (*Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158), nor upon the boats, engaged, as they were in interstate commerce and making, as they did, only temporary landings at the wharf in the city of Memphis: *St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 20 L. ed. 192.

The question then presented is, Does the principle which thus restrains the taxing power of this state, both as to the capital stock of this company, and of its boats employed in ferry purposes, also prevent the exaction of a privilege tax from one running a bar on one of these boats while at its landing within the jurisdiction of this state?

We think it beyond doubt that the legislature of Tennessee could not impose a privilege tax upon this company for disem-

barking its passengers and discharging its cargoes of freight at the wharf in the city of Memphis, or for gathering passengers and freight to be transported across the river to the state of Arkansas: *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826, 29 L. ed. 158. The exemption from this tax rests upon the fact that receiving and landing passengers and freight were incident to their transportation, without which there could be no such ²²⁹ thing as transportation of either across the Mississippi river. Such a tax would be a burden on interstate commerce, and clearly unenforceable: *Henderson v. Mayor of New York*, 92 U. S. 259, 23 L. ed. 543.

But can the same thing be said as to the privilege license required for maintaining a bar for the sale of spirituous liquors on one of its boats? So far as the agreed statement of facts shows, the charter conferred no right on the company to maintain a bar, or rent the privilege of doing so to another; nor can we see that the exercise of such a privilege forms an essential part of the business which it is authorized to do.

But again, it is not disclosed that the liquors and beer dispensed to customers over the bar on the boat in question were brought into this state from Arkansas, or from any other foreign state, so as, in any form, to give the plaintiff in error the benefit of the interstate clause of the federal constitution or any of the laws of Congress regulating commercial intercourse between the states. For all that appears in the record, the intoxicants kept and sold at this bar may have been purchased in Tennessee by Harrell for retail at the port of Memphis, within this state. If this be the fact, we can see no reason why the plaintiff in error, so retailing, should stand on any higher ground than the seller of drinks over the bar of any one of the saloons of that city.

But we do not deem it necessary to place this case on narrow or technical ground, as we think the judgment of the trial court can be rested on the broader ground ²³⁰ that the imposition of the tax or license fee was distinctly within the police power of the state.

With regard to the retailing of intoxicants, there has never been a question as to the right of the several states to control the subject. The long line of cases found in the reports of the supreme court of the United States agree in affirming the general proposition that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the states, and within their police power, which has not been sur-

rendered to the federal government: *License Cases*, 5 How. 504, 12 L. ed. 256; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 897, 28 L. ed. 629; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346; *Eilenbecker v. Ply. Co.*, 134 U. S. 31, 10 Sup. Ct. Rep. 424, 33 L. ed. 801.

In the earliest and most celebrated of these cases, reported under the title of the "License Cases," supra, there was involved a question of the constitutionality of certain laws passed by the legislatures of Massachusetts, New Hampshire, and Rhode Island, restricting the sale of liquors in these different states. In the New Hampshire case the courts of the state applied the statute then in force to the sale by the importer of a barrel of gin, which was unbroken and in the same condition that it was when brought into the state. The justices of the ²³¹ supreme court of the United States agreed in maintaining the constitutionality of this statute, though they rested their conclusion on different grounds. Chief Justice Taney, in an opinion universally recognized as of great ability, while conceding the power of Congress to deal exclusively with the subject of the importation of intoxicants, and, when so dealing with it, that its action would supplant all repugnant statutes passed by the states, yet held that the acts in question were valid, because Congress had not legislated with regard thereto. This view was the prevailing one with that court for many years, as the reasoning of the chief justice was often referred to, and the decision was as often cited with approval.

But in *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700, the authority of these cases was greatly weakened. The Bowman case involved the validity of a statute of the state of Iowa which imposed a penalty upon any railroad company or other common carrier that should knowingly bring into the state any intoxicating liquors without first having obtained a certificate from the proper authority certifying that the consumer was authorized by the laws of Iowa to sell such liquors. While the court recognized that this statute had been passed for the purpose of carrying out the general legislative design to protect the health and morals of the people of that state, yet it was held to be constitutional, upon the ground that it was an effort to regulate commerce ²³² between the states. While the court did not in express terms overrule

the license cases, and the later cases resting for authority on them, yet there was a clear suggestion throughout the argument of a doubt as to the soundness of the conclusion announced therein. But what the court seemed to hesitate to do in the Bowman case was expressly done by a majority opinion in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128. There it was held that the importation of liquors from foreign countries, and from one state to another, was a subject which required a general and uniform rule for its regulation, free from state interference, and therefore the states were without authority to control the subject, even though Congress had not enacted any legislation with regard thereto.

The opinions in these two later cases attracted great attention, and produced a feeling of discontent among those who believed the liquor traffic, in all of its power, should be under the supervision of the various states. This conviction was so widespread, and such pressure was brought to bear upon Congress, that in 1890 it passed an act, popularly known as the "Wilson Bill" (Act August 8, 1890, 26 Stats. 313, c. 728, U. S. Comp. Stats. 1901, p. 3177), which provides that "all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation or effect of the laws of such state or territory . . . and ²³³ shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The constitutionality of this law was attacked in *Wilkerson v. Rahrer*, 140 U. S. 561, 11 Sup. Ct. Rep. 865, 35 L. ed., 572, but it was there sustained as a proper exercise of legislative power.

But it is to be observed that the authority of *Bowman v. Chicago Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700, and of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, never extended further than to protect the importer of original packages or fermented or distilled liquors or beer as long as they were unbroken, and, by necessary implication, excluded from the exemption from state control those persons engaged in the mere retail liquor business. As to them and their business, no doubt ever did exist of the state's power of regulation by the imposition of privilege taxes or otherwise, and the only effect of the Wilson bill was to hand over the importer, even with his original package, after the terminus of its transit had been reached, to the control of the state.

So it is that the importer of intoxicants, whose packages had reached such terminus, and the retailer now stand on the same ground, and are equally under the strong and restraining hands of the several states.

But it is said, however, in the argument of the counsel for plaintiff in error, that this act was not intended to interfere with the interstate commerce of intoxicants, but its operation was confined to liquors or liquids introduced into a state or territory after they had become mingled with the mass of the taxable property of such ²³⁴ state or territory; and for this proposition *Wilkerson v. Rahrer*, 140 U. S. 561, 11 Sup. Ct. Rep. 865, 35 L. ed. 572, *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088, and *Vance v. Vandercock Co.*, 170 U. S. 468, 18 Sup. Ct. Rep. 645, 42 L. ed. 1111, are cited by counsel.

To this contention it may be replied that, were this its only effect, then it was idle legislation. For it was never a matter of doubt—the absolute right of the state to control, by taxation or otherwise, either intoxicants or any other character of property, when once incorporated with the general mass of property within the state. As has been seen, as to intoxicants, the struggle upon the part of some of the states was to assume control while they were in unbroken packages in the hands of the importer. It was against this claim the cases of *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700, and *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128, were leveled. It was there, however, conceded, and, so far as we know, it has been uniformly so, that, when once the original package is broken it has passed beyond the limit of federal control, and into that of the state.

Nor do the cases upon which the counsel of plaintiff in error rests for this contention support it. In *Wilkerson v. Rahrer*, 140 U. S. 561, 11 Sup. Ct. Rep. 865, 35 L. ed. 572, the court, having discussed the restrictive effect upon the legislation of the several states of the *Bowman* and *Leisy* cases, then adds (referring to the Wilson bill): “Congress has now spoken, and declared that imported liquors or liquids ²³⁵ shall, upon arrival into a state, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?” In *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. Rep. 664, 42 L. ed. 1088, it is said: “It has been settled that the effect of the act of Congress is to allow the statutes of the

several states to operate upon packages of imported liquor before sale"; but it was at the same time held that state legislation of a restrictive character could not attach to such packages "the moment they reached the state line, and before the completion of the act of transportation." The first of the syllabi in *Vance v. Vandercok Co.*, 170 U. S. 468, 18 Sup. Ct. Rep. 645, 42 L. ed. 1111, clearly shows that it is in accord with the *Wilkerson* and *Rhodes* cases. It is as follows: "Under the act of August 8, 1890 [Wilson Bill; 26 Stats. 313, c. 728 (U. S. Comp. Stats. 1901, p. 3177)], the restriction and regulations of state laws become operative on the original packages of intoxicating liquors imported into a state before the sale thereof, and therefore such packages cannot be sold if the state law forbids the sale, or can be sold in the manner and form prescribed by the state regulations."

We have been referred to the case of *State v. Frappart*, 31 La. Ann. 340, where it was held that the imposition of a license tax for selling beer and liquors from a bar on a steamboat plying between ports in the states of Louisiana and Mississippi, at one of the intermediate ports, was an unauthorized interference with commerce between the states. This case, it may be conceded, sustains ²³⁶ the contention of plaintiff in error; but we are not able to agree with it, as, in our view, the retailing of liquor does not, in any event, constitute interstate commerce.

It follows that the judgment of the lower court is affirmed.

That State Laws regulating the manufacture and sale of liquors and cigarettes, although they affect commerce, are not regarded as regulations of interstate commerce within the meaning of the federal constitution, see *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283; *Tredway v. Riley*, 32 Neb. 495, 29 Am. St. Rep. 447.

WILKERSON v. DENNISON.

[113 Tenn. 237, 80 S. W. 765.]

OFFICE AND OFFICERS—Powers of Deputies.—Clerks of county courts are authorized to appoint deputies, who are vested with all power and authority of the principal, and whose acts are the acts of the principal by his lawfully appointed agent. (p. 821.)

OFFICE AND OFFICERS.—Deputy Clerks of County Courts are authorized to take and certify the acknowledgment of deeds in both the names of their principal and of themselves as deputies, or either. (p. 822.)

OFFICE AND OFFICERS—Acknowledgment by Deputy.—An acknowledgment of a deed taken before a deputy county clerk, with the certificate made and signed by him in his own name, without the name of his principal appearing, is valid. (p. 823.)

OFFICE AND OFFICERS—Acknowledgment by Deputy.—An acknowledgment, and privy examination of a married woman to her deed, taken before a deputy county court clerk, with the certificate made and signed by him in the name of his principal is valid, though such deputy's name does not appear. (pp. 824, 825.)

W. M. Taylor and D. E. Scott, for the complainant.

J. T. Hayes and T. A. Lancaster, for the defendants.

238 SHIELDS, J. Complainant attacks a deed made by her husband, when in life, and herself, conveying certain lands of the former, upon the ground that it has no valid certificate of her privy examination annexed and registered.

The relief sought is a recovery of homestead.

It is admitted that the privy examination was taken by S. E. Murray, the legally appointed deputy of D. A. Griggs, clerk of the county court of Henderson county, and that he made and appended to the deed a certificate in proper form, save that it recites that the examination **239** was taken by D. A. Griggs, county clerk, and purports to have been signed by him officially in his own proper person, and this is the ground of the attack. It is said that, the examination having been taken by S. E. Murray in the absence of his principal, the certificate should have been made in his name as deputy clerk, and so signed by him, and, having been made in the name of the clerk, and attested by his signature, it is void.

Clerks of the county courts of this state are authorized to appoint deputies with full power to transact all the business of such clerks: Code 1858, sec. 4050, subsec. 4 (Shannon's ed., sec. 5865). Deputies appointed under this statute are vested with all the powers and authority of principal clerks.

This court construing this section in *Martin v. Porter*, 4 Heisk. 413, said: "The power to appoint a deputy necessarily involves the idea that he shall act in the place of and for the regular clerk, and exercise the same powers; the acts of the deputy being the acts of the principal clerk by his lawfully appointed agent."

The statute providing for the authentication of instruments for registration authorizes the acknowledgment, which includes privy examination, to be made by the persons executing them who reside or are within the state, before the clerk, or his legally appointed deputy, of any county court of the state: Code 1858, sec. 2039 (Shannon's ed., sec. 3713).

There can be no doubt but that under both of the ²⁴⁰ sections of the code referred to a legally appointed deputy of a clerk of the county court is authorized to take the privy examination of a married woman to a conveyance of her real estate, and the only open question is whether or not the certificate which is required to be made of the examination shall show that it was made and signed by him as such deputy, or made in the name of the principal and authenticated by his signature.

There is nothing in either of these sections directing the course to be pursued, and the question must be determined upon principle.

Mr. Mechem, in his work upon Public Officers, section 585, has very clearly stated the law upon the subject in these words: "The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. The conflict in the cases is, however, believed to be more apparent than real, and to be readily settled by reference to principles already considered.

"In several of the states the authority to act in an official capacity is given to the principal alone, or, if the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal, and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is manifestly a derivative and subsidiary one—it is the authority conferred upon the principal, and not ²⁴¹ an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists, and not in his name, who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.

"In other states, as has been seen, the deputy is recognized as an independent public officer, and is endowed by law with authority to do any act which his principal might do. In these cases, where the authority exists in the deputy himself by operation of law, and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself.

"Under either state of facts the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal."

We are of the opinion that deputy clerks of the county courts of this state are authorized to take and certify the acknowledgment of deeds in both the names of their principals and themselves as deputies. The authority to do so in the name of their principals is conferred by section 4050, *supra*, vesting in them all the powers of principal clerks; and section 2039, *supra*, confers upon them in their official capacity as deputies the authority independent of that derived from the principal clerks. ²⁴² This last was held by this court in the case of *Beaumont v. Yeatman*, 8 Humph. 542, where an acknowledgment or probate made and signed by a deputy clerk in his own name, that of the principal nowhere appearing, was held valid, and the deed properly authenticated for registration; and this was also reaffirmed in the later case of *Tipton v. Jones*, 10 Heisk. 565.

We have no reported case in this state, in which the validity of an acknowledgment taken and certified by a deputy in the name of his principal, like the one here involved, has been called in question. It is true that Judge Turley, in the case of *Beaumont v. Yeatman*, 8 Humph. 542, above referred to, does state that certificates of acknowledgments should be made by and in the name of the officer taking the acknowledgments, but the question we now have for decision was not involved there, and this statement was mere dictum.

This precise question arose in the case of *Talbott v. Hooser*, 12 Bush, 414. The acknowledgment to the deed challenged in that case was taken by R. E. Harrison, the deputy, and the certificate was written so as to show that the maker of the conveyance acknowledged the execution of it before B. M. Harrison, the clerk of the court whose signature also appeared to it, as if it had been signed by himself. These were admitted facts. The contention of complainant was that the certificate was not

the act of B. M. Harrison, because he did not take the acknowledgment or make the certificate; and that it was not that of R. E. Harrison, the deputy, since it did not appear to be made by him, and he did not sign it.

²⁴³ The court, in holding the certificate valid, said: "The deputy 'is but the officer's shadow, and doth all things in the name of the officer himself, and nothing in his own name, and his grantor (principal) shall answer for him' (3 Kent, 458); and in *Triplett etc. v. Gill etc.*, 7 J. J. Marsh. 438, and *Commonwealth v. Arnold*, 3 Litt. 316, this court held that a deputy had a right to sign his principal's name, and in the latter case that a deputy appointed merely by parol had such authority.

"Whatever official act is done by a deputy should be done in the name of his principal, and not in the name of the deputy. The authority given by law to a ministerial officer is given to the incumbent of the office. Authority is not given to the deputy, but to the principal, and is exercised by the principal either by himself or his deputy; so that, whether the deed was acknowledged before B. M. Harrison in proper person or before R. E. Harrison, it was, in contemplation of law, acknowledged before the former in his official capacity; and it was not only lawful, but entirely proper, that the body of the certificate should read precisely as if the clerk in proper person had taken and certified the acknowledgment, the only irregularity being that the deputy omitted, after signing his principal's name, to add, 'By R. E. Harrison, D. C.'

"The certificate being regular and valid on its face, Mrs. Talbott sought to avoid it by proving that it was not in fact signed by the principal clerk, and in doing ²⁴⁴ so she proved that it was written and the clerk's name signed by R. E. Harrison, and, he being a deputy authorized by law to sign his principal's name, the evidence offered to show the certificate illegal because B. M. Harrison did not affix his signature to it, shows it to be valid because his name was signed by an authorized deputy."

The authority of a deputy of a public officer is also somewhat similar to that of a private agent, who, it is well settled, may contract in the name of his principal, signing it alone without any reference whatever to himself: *Mechem on Agency*, secs. 428, 429, 433, 434.

Contracts in certain cases are also authorized by statute in this state to be executed by an agent in the name of his principal alone: Code 1858, sec. 2012 (Shannon's ed., sec. 3679).

The act of the officer taking the acknowledgment, notwithstanding what has been said in some later cases of its judicial nature, is largely ministerial, as held by Judge Turley in the case of *Beaumont v. Yeatman*, 8 Humph. 542, and there is no sound reason why the record of it may not be made by the agent in the name of his principal, as may be done in the performance of nearly all other acts by agents for principals.

This holding is also in accordance with the policy of the law to uphold the probates of conveyances, and when the laws regulating them have been substantially complied with, and there is no suspicion of unfairness or fraud. Complainant admits in her bill that she executed the conveyance with full knowledge of its provision, ²⁴⁵ and that her privy examination was properly taken by an officer authorized by law to take it; her sole complaint being, as she claims, that a proper record or certificate of the examination was not made.

The result is that the privy examination annexed to the deed in question is valid, and the deed effective to convey the interest which complainant had in the premises therein described.

The decree of the chancellor holding to the contrary is therefore reversed, and the bill dismissed, with costs.

IN WHOSE NAME DEPUTY SHOULD ACT.

- I. Introductory, 825.**
- II. When Must Act in Name of Principal, 826.**
- III. Conflict of Decision in Same State, 828.**
- IV. Deputy Acting in Name of Principal Alone, 829.**
- V. When may Act in His Own Name Alone, 830.**

I. Introductory.

The question in whose name a deputy officer may act is one of considerable importance, and of some apparent difficulty. The conflict in the authorities (and in some states the question has, apparently, been decided different ways) is believed to arise from the existence or nonexistence of statutes on the subject. It is generally admitted, even in the absence of statute, that all ministerial duties which the principal himself has a right to do, may be discharged by his deputy, but a majority of the cases declare the doctrine that the authority given by law to a ministerial officer is given to the principal alone, in the absence of a statute declaring otherwise; and that a deputy appointed by him, being the mere agent of the principal, whatever official act is done by him must be done in the name of the principal by himself as deputy, and if done in such manner is well and properly performed: *Abrams v. Erwin*, 9 Iowa, 87; *Triplett*

v. Gill, 7 J. J. Marsh. 438; *Spinger v. McSpadden*, 49 Mo. 299; *State v. Johnson*, 1 Hayw. (N. C.) 293; *Emley v. Drum*, 36 Pa. St. 123; *Marx v. Hanthorn*, 30 Fed. 579.

II. When must Act in Name of Principal.

In many jurisdictions the rule prevails that the deputy must sign in the name of his principal. This rule is based upon the principle that where the authority exercised by the deputy is manifestly a derivative and subsidiary one, it is the authority conferred upon the principal and not an authority inherent in the deputy. It follows, in such cases, that the authority must be exercised in the name of him in whom it exists, and not in the name of him who has no recognized authority. Where this doctrine prevails, whatever official act is done by a deputy must be done in the name of his principal, and not in the name of the deputy. The authority given by law to a ministerial officer is given to the incumbent of the office as principal alone. No authority is given to the deputy, and he cannot act except in the name of his principal. If he attempts to act in his own name alone, his act is void: *Blackwell v. Gloss*, 43 Ark. 212; *Perkins v. Reed*, 14 Ala. 537; *Lewes v. Thompson*, 3 Cal. 266; *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 401; *Reinhardt v. Lugo*, 86 Cal. 398, 21 Am. St. Rep. 53, 24 Pac. 1089; *Gibbens v. Pickett*, 31 Fla. 147, 12 South. 17, 19 L. R. A. 177; *Ditch v. Edwards*, 1 Scam. 126, 26 Am. Dec. 414; *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Abrams v. Erwin*, 9 Iowa, 87; *Robinson v. Hall*, 33 Kan. 143, 5 Pac. 763; *Evans v. Wilder*, 7 Mo. 359; *Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893; *Simonds v. Catlin*, 2 Caines, 61; *Lessee of Anderson v. Brown*, 9 Ohio, 151; *Dennison v. Story*, 1 Or. 273; *Rose v. Newman*, 26 Tex. 131, 80 Am. Dec. 646; *Cook v. Knott*, 28 Tex. 85; *Frizzell v. Johnson*, 30 Tex. 32; *Wimbish v. Wofford*, 33 Tex. 110; *Arnold v. Scott*, 39 Tex. 378; *Marx v. Hanthorn*, 30 Fed. 579.

The rule of these cases is founded on the principle that in order for a deputy to act in his own name alone, he must derive power to that end directly from the statute, and that he does not possess such authority merely from his appointment by his principal. This is well stated in *Gibbens v. Pickett*, 31 Fla. 150, 12 South. 17, 19 L. R. A. 177, where the court said: "While our statute in express terms authorizes sheriffs to appoint deputies to act under them who shall have the same power as the sheriffs appointing, and for whose neglect and default in the execution of their office the sheriff shall be responsible, still there is nothing more in the statute than a declaration of that which was common law on the subject from time immemorial in England and in this country, and we can see nothing in the statute that creates in a deputy sheriff any independent distinctive official power or authority, except such as he derives as deputy from and through his principal. The term 'deputy' neces-

sarily carries with it the idea that he has a principal, and that he cannot act independently in his own name and stead, but performs all official acts of this kind in the name and stead of such principal for whom, as deputy, he is alone authorized to act. If he undertakes to act in his own name and on his own authority, then he no longer acts as deputy, but as an independent official recognizing no official superior. When he acts as deputy for, and in the name and stead of, his principal, then the law recognizes his acts as being the acts of his principal, just as though the principal had performed them in person. And it is only when the act of the deputy can be thus recognized as the act of the principal, that it can be recognized at all. When he ceases to act for the principal, as the principal's deputy, he at once becomes stripped of all official authority. The acts that he performs are official acts that devolve by law upon his principal; and when he performs, and, as in the case at bar, gives expression to his performance of them in the shape of a return of the service of process he must make it appear therein that it is the act of his principal by or through himself as deputy; otherwise the action cannot be recognized as official": *Gibbens v. Pickett*, 31 Fla. 151, 12 South. 17, 19 L. R. A. 177. It would seem to follow, naturally, that, whenever the above rule prevails, the return of process, or the execution or acknowledgment of a written instrument by the deputy in the name of his principal by himself as deputy is valid and regular; but that if it be by the deputy in his own name it is irregular and generally invalid: *Gibbens v. Pickett*, 31 Fla. 151, 12 South. 17, 19 L. R. A. 177; *Hope v. Sawyer*, 14 Ill. 254; *Abrams v. Erwin*, 9 Iowa, 87; *Embley v. Drum*, 36 Pa. St. 123; *Huey v. Van Wie*, 23 Wis. 613; *Marx v. Hanthorn*, 30 Fed. 579.

As an application of the doctrine above announced, it may be stated that it has been held in numerous cases that a return to summons signed by a deputy sheriff without mentioning the sheriff's name is a nullity; or, in other words, that the act or return of a deputy sheriff is a nullity, and void, unless done in the name of the sheriff: *Perkins v. Reed*, 14 Ala. 536; *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; *Gibbens v. Pickett*, 31 Fla. 147, 12 South. 17, 19 L. R. A. 177; *Ditch v. Edwards*, 1 Scam. 127, 26 Am. Dec. 414; *Simonds v. Catlin*, 2 Caines, 61; *Dennison v. Story*, 1 Or. 273; *Arnold v. Scott*, 39 Tex. 379.

In *Village of Auburn v. Goodwin*, 128 Ill. 58, 21 N. E. 212, it is said that a "deputy officer, as a rule, subject, perhaps, to some special statutory exceptions, derives all his powers and authority from his principal, and in all of his official acts he must act in the name of his principal. Therefore, a deputy county surveyor acting in his own name, and not that of his principal in making a survey, and a plat of a town addition, does not bind the principal or make his act that of the county surveyor." And in *Carter v. Hornback*, 139 Mo.

128, 40 S. W. 893, it was held that the law is well settled that the official acts done by a deputy must be done in the name of his principal. Hence, a survey made by a deputy surveyor in his own name is not entitled to record, and the record thereof is not admissible in evidence. It has also been held that acknowledgments taken before a deputy and signed with his own name, without showing his principal, without special statutory authority in him to so act, are not valid: *Abrams v. Ervin*, 9 Iowa, 87.

III. Conflict of Decision in Same State.

As we have already mentioned, it has been held, and has become the rule in California, that a return to process made by a deputy sheriff in his name alone without mention of his principal, is a nullity: *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403; *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, 24 Pac. 1089; and the reason given is that the "courts cannot know an undersheriff; and the act and return of a deputy is a nullity unless done in the name and by the authority of the sheriff": *Joyce v. Joyce*, 5 Cal. 449. On the other hand, it was held in *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108, that under a statute authorizing county clerks to appoint deputies, and making the authority of such a deputy in taking and certifying acknowledgments of conveyances coextensive with that of his principal, the act of such deputy in making a certificate of acknowledgment of a conveyance in his own name alone, without mention of his principal, with the proper seal of the court affixed, rendered the certificate sufficient, and entitled the conveyance to record. Likewise in Florida there is an apparent and direct conflict in the cases. Thus in *Gibbens v. Pickett*, 31 Fla. 147, 12 South. 17, 19 L. R. A. 177, it was decided that a return of service signed by a deputy sheriff in his own name without disclosing the name of his principal for whom he acted as deputy in making the service, is a nullity. This decision was placed partly on the ground that to enable a deputy to thus act alone, he must be given express power by the statute, and that no such statutory power had been conferred upon him. In rendering this decision in *Gibbens v. Pickett*, 31 Fla. 147, 12 South. 17, 19 L. R. A. 177, the court entirely overlooked the decision rendered in *Sumner v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815, that a deputy whose principal is authorized to take acknowledgments to instruments independently of any statutory provision, may legally take them in his own name as deputy, without mentioning his principal. We fail to see any distinction in the nature of the official acts performed upon which to base these opposing and conflicting decisions.

At an early date in Texas the rule prevailed that a deputy sheriff's signature to a return of process, followed by his proper official designation, was sufficient, and valid, without the sheriff's name appearing, because such deputy is an officer known to the laws

Miller v. Alexander, 13 Tex. 497, 65 Am. Dec. 73; *Towns v. Harris*, 13 Tex. 507. Later this rule was abandoned and the doctrine established that a deputy in making a return must state for whom he acted as deputy, and if he omitted his principal's name his act was a nullity: *Jordan v. Terry*, 33 Tex. 380; *Arnold v. Scott*, 39 Tex. 379; or that a citation tested by a deputy clerk in his own name as deputy clerk, and pretermittting the name of his principal was void: *Wimbish v. Wofford*, 33 Tex. 110. It is now the rule in Texas, under statute, that deputy district clerks in taking acknowledgments and proof deeds exercise direct and not derivative power, and that in law such act must be deemed his own act and not the act of his principal, and that he may properly act in his own name alone in his official character: *Herndon v. Reed*, 82 Tex. 647, 18 S. W. 665, following *Rose v. Newman*, 26 Tex. 131, 80 Am. Dec. 646, and overruling *Miller v. Thatcher*, 9 Tex. 486, 60 Am. Dec. 172.

In Kentucky, a deputy county clerk seems to have a wide discretion as to how he may act in taking acknowledgments to deeds. In *Talbott v. Hooser*, 12 Bush, 408, it was held that whatever act is done by a deputy should be done in the name of his principal, and not in his own name, and as a result that a deputy county clerk has a right to sign the name of his principal to the certificate of the acknowledgment of a deed, omitting any mention of himself, and that such act is valid. And in *Beuley v. Curtis*, 92 Ky. 505, 18 S. W. 357, it was held that while a deputy clerk should act in the name of his principal, and not in his own name, a certificate to a deed made and signed by him in his own name as "deputy clerk" without using the name of his principal either in the body of the certificate or in the subscription was not void. In this case the court said that "the copy shows that it was made a recorded instrument, and to hold under these circumstances, that because the deputy, although acting for, and in the name of his principal, failed to use the name of his principal in making out the certificate, but certified in his own name, but as deputy of the Mason county court clerk, would be a sacrifice of right and justice to mere form": *Beuley v. Curtis*, 92 Ky. 509, 18 S. W. 357.

IV. Deputy Acting in Name of Principal Alone.

But one case has come under our observation where a deputy attempted to act in the name of his principal alone without mention of himself in any way, and in that case his act was decided to be valid. In *Talbott v. Hooser*, 12 Bush, 408, an acknowledgment of a deed was taken before a deputy county clerk, the certificate being made out by the deputy in the name of the principal clerk alone. Objection was raised that the deed was irregularly executed, the acknowledgment being in the name of one person, when in fact it was taken by another whose name did not appear on the instrument. But the court ruled that the certificate thus made by the deputy

in his principal's name was regular, saying: "Whatever official act is done by a deputy should be done in the name of his principal, and not in the name of the deputy. The authority given by law to a ministerial officer is given to the incumbent of the office. Authority is not given to the deputy but to the principal, and is exercised by the principal, either by himself or his deputy." The only irregularity claimed in this case was the omission by the deputy, after signing his principal's name to add by himself in his name as deputy. This case of *Talbott v. Hooser*, 12 Bush, 408, is relied upon as authority for the decision in the principal case.

V. When may Act in His Own Name Alone.

In those jurisdictions where the deputy is recognized as an independent public officer, and is endowed by statute with authority to do any act which his principal may do, the authority exists in the deputy himself to act alone by operation of law, and not being derived solely through the principal, it is well executed in the name of the deputy alone without mention of his principal. Those decisions which recognize as valid acts of deputies done in their own name alone, proceed upon the ground, as heretofore stated, that the deputy is an officer known to the law of those states wherein the decisions were pronounced. The deputy being known to the law, as evidenced by statutory provisions in respect to them, as one authorized to perform the duties of his principal, the mere omission to sign the name of such principal does not vitiate an act otherwise regular. And to this effect are the following cases: *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Waddingham v. Dickson*, 17 Colo. 223, 29 Pac. 177; *Sumner v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815; *Ballard v. Orr*, 105 Ga. 195, 31 S. E. 554; *Calender v. Olcott*, 1 Mich. 344; *Wheeler v. Wilkins*, 19 Mich. 78; *Allen v. Hazen*, 26 Mich. 142; *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256; *Fells v. Barbour*, 58 Mich. 49, 24 N. W. 672; *McCraven v. Doe ex dem. McGuire*, 23 Miss. 100; *De Villers v. Priolean*, 2 McCord, 89; *Beaumont v. Yeatman*, 8 Humph. 542; *Tipton v. Jones*, 10 Heisk. 564; *Herndon v. Reed*, 82 Tex. 647, 18 S. W. 665; *Eastman v. Curtis*, 4 Vt. 616. As examples of this rule attention may be drawn to the fact that a deputy county clerk may legally sign a writ in his own name without the name of the principal clerk: *Calender v. Olcott*, 1 Mich. 344; or a return to a writ may be signed by a deputy sheriff in his own name: *Wheeler v. Wilkins*, 19 Mich. 78. Sheriff's deputies are recognized by statute as distinct officers, and their acts may be certified in their own names without the names of their principals: *Eastman v. Curtis*, 4 Vt. 616. A deputy auditor general may sign and execute a tax deed in his own name alone: *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256; *Dreiman v. Herzog*, 56 Mich. 467, 23 N. W. 170; *Fells v. Barbour*, 58 Mich. 49, 24 N. W. 672. A certificate of pro-

bate in the usual form signed by a person as deputy clerk without anywhere naming his principal is good and valid: *Beaumont v. Yeatman*, 8 Humph. 542. Under a statute authorizing deputy district clerks to take acknowledgments and proof of deeds, such deputy, in taking such proof, exercises direct and not derivative power. Hence the act is his own and not that of the principal, and his certificate of acknowledgment or proof of a deed is properly made in his own name and official character alone: *Herndon v. Reed*, 82 Tex. 647, 18 S. W. 665. A deputy whose principal is authorized to take acknowledgments to instruments may legally take them in his own name as deputy, without mentioning his principal: *Sumner v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562, 14 L. R. A. 815; *Mackenzie v. Jackson*, 82 Ga. 80, 8 S. E. 77. Process which is signed alone by the deputy clerk of the superior court is as valid and sufficient in law as if signed by the principal clerk: *Goodwyn v. Goodwyn*, 11 Ga. 178; *Jacobs v. Measures*, 13 Gray, 74. And the certificate of the probate of a deed by a deputy clerk in his own name alone, when he is expressly authorized by statute to take acknowledgments, etc., is valid and prima facie evidence of his appointment and qualification: *Piland v. Taylor*, 113 N. C. 2, 18 S. E. 70. If under the statute a deputy clerk is an independent officer and not a mere deputy, in the ordinary sense of that term, and is clothed with certain powers and duties separate and distinct from those of the principal clerk, "deputy clerk" is the title of his office, and therefore his proper official signature: *Willamette Falls Canal etc. Co. v. Gordan*, 6 Or. 175.

EDWARDS v. STACEY.

[113 Tenn. 257, 82 S. W. 470.]

MARRIED WOMEN—Contract to Purchase Land—Disaffirmance.—A married woman electing to rely upon her disability to avoid a contract to purchase land which has been conveyed to her cannot recover partial payments made by her. (p. 832.)

MARRIED WOMEN—Contract to Purchase Land—Disaffirmance.—The rule that a married woman, electing to rely upon her disability to avoid a contract to purchase land, cannot recover partial payments made by her, applies as well to executory contracts under a valid executed contract by the vendor to make a conveyance, as when a conveyance of the title has been made. (p. 832.)

C. Ewing, for the complainant.

A. B. Pittman, for the defendant.

258 SHIELDS, J. Mrs. Edwards, a married woman, contracted with the defendant, Stacey, as agent for Mrs. Bickford, to purchase a house and lot in Memphis, Tennessee, for five thousand dollars. The contract was reduced to writing and signed by the parties. Mrs. Edwards paid the defendant two hundred and fifty dollars cash, and agreed to make notes for the remainder of the purchase money upon delivery of a conveyance of the property. Afterward, before tender of the conveyance, she repudiated the contract, and brought this suit to recover the cash payment made.

There is some controversy whether the two hundred and fifty dollars was a part payment of the purchase money, or a sum to be forfeited in the event of complainant's failure to complete her contract of purchase, but we are of the opinion that it was a payment upon the purchase price agreed to be paid for the house and lot, and must be so treated.

Complainant does not controvert that a married woman electing to rely upon her disability to avoid the performance of a contract to purchase land which has been conveyed to her cannot recover partial payments which she has made, and this seems to be well-settled law: *Jackson v. Rutledge*, 3 Lea, 626, 31 Am. Rep, 655.

Her contention is that no conveyance of the property purchased having been made, the contract is executory, and she may repudiate it entirely, and recover the cash payment made by her.

259 We are unable to see any distinction in the rights of a married woman, where a conveyance of title is made, and where a valid contract to make such conveyance is executed by the vendor. Both instruments are made by the vendor, who is competent to contract; one an executed, and the other an executory contract and equally binding upon him. The contract of the vendee in both cases is to pay money, and her right to repudiate it is the same whether a conveyance be made or only contracted to be done. What she does in both cases is to make part payment of the purchase price agreed upon—to part with her money. The delivery of a conveyance does not obligate her any more than a valid contract to convey. The two contracts differ only in their effect upon the vendor and the property.

The disability of coverture was never intended to enable married women to do injustice or wrong. It is a weapon of defense, not of offense. It is a protection against all attempts to compel them to complete their contracts, if they consider it to their

interest to decline to proceed further with them; but it does not give them the right to recover money paid under an agreement fairly made. The money of a married woman is her absolute property, aside from the rights of her husband, and she has the right to part with it in any manner she may desire, and when she does so, in the absence of fraud, her action is irrevocable.

These are the reasons given in the cases where conveyances were made in the execution of contracts of ²⁶⁰ sales of real estate to married women for refusing recoveries of part payments of purchase money, and we can see no reason why they do not apply with equal force to cases of this character.

This is said to be the rule in the case of *Johnson v. Jones*, 51 Miss. 860, in an able opinion by Campbell, J., and, although this exact point was not directly there involved, it is fully considered by that distinguished judge and clearly shown that there is no reason for a distinction in cases where a conveyance is made and those where the contract is to make one at some future time.

We are of the opinion that there is no error in the decree of the chancellor, and it is affirmed, with costs.

A Married Woman, it is said, cannot bind herself by an executory contract to convey her land: *Walters v. Wagley*, 53 Ark. 509, 22 Am. St. Rep. 232. Compare *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426. That her deed may be avoided by herself alone, see *Meade v. Clarke*, 159 Pa. St. 159, 39 Am. St. Rep. 669. In *Jackson v. Rutledge*, 3 Lea, 626, 31 Am. Rep. 655, it is held that a married woman, accepting a conveyance of land to her separate use, reserving a lien for unpaid part purchase money, is bound by the conveyance, and cannot recover her payments, and the lien may be enforced.

CLAIBORNE v. STATE.

[113 Tenn. 261, 83 S. W. 352.]

BURGLARY—*Burglarious Breaking*.—Felonious raising of an open window in a dwelling-house sufficiently to make the aperture large enough to admit the body of the person entering, is a sufficient breaking and entering to constitute burglary. (p. 836.)

W. F. Hamner, for the plaintiff in error.

C. T. Cates, attorney general, for the state.

²⁶² NEIL, J. The plaintiff in error was indicted in the criminal court of Shelby county for the crime of burglary. He

was convicted, and sentenced to ten years' imprisonment in the state penitentiary. Motion for new trial was made and overruled, and he has appealed to this court and assigned errors.

It appears that the plaintiff in error clandestinely entered the house of M. B. Winchester in the night-time, and, on being discovered, escaped. He introduced testimony at the trial for the purpose of proving an alibi, but we do not think that the alibi is sustained. But it is urged that the plaintiff in error was not guilty of a technical breaking of the house.

The crime of burglary is defined in our statutes as follows: "Burglary is the breaking and entering into a mansion house by night with intent to commit a felony."

The record shows that all of the outside doors of the house were closed, but that two windows in one of the rooms were partially up from the bottom—not leaving an aperture, however, large enough for a man to enter—and that the prisoner increased one of the apertures by raising the window high enough to enable him to get his body through, and effected his entrance in that manner.

In *State v. Connors*, 95 Iowa, 485, 64 N. W. 295, it appeared that the keeper of a store was sitting outside in front of the store, the front door being open; that the permanent door at the rear of the room was also open, ²⁶³ but there was a wire screen door, which was closed. This door was not fastened with a latch, but was hung on spring hinges, which served to keep it closed. The accused opened this door and entered the store, and was at the money drawer, when the bell in connection therewith sounded. About this time he was discovered and arrested. This was held to be a breaking within the meaning of the statute.

In *Webb v. Commonwealth*, 18 Ky. Law Rep. 220, 35 S. W. 1038, a door of the house which was burglarized (a livery-stable) consisted of latticed and a solid part. The latticed part was the upper part, and was about seven feet high and nine feet wide, below which the solid part of the door hung, and filled a space of about three and one-half feet by nine feet. The latticed part was standing open. The other part was fastened by a hasp and pin. The defendant unfastened it by removing the pin and shoving the door open. This was held to constitute a breaking.

In *Knotts v. State* (Tex. Cr. App.), 32 S. W. 532, it was held that to enter a millhouse by crawling through a small hole under the sill constituted a breaking, within the Texas statute defining burglary.

In *Marshall v. State*, 94 Ga. 589, 20 S. E. 432, it was held that entering a factory through a hole left for a band operating machinery, by pushing aside the band to make room for the body, was a sufficient breaking.

In *Miller v. State*, 77 Ala. 41, it was held that there was sufficient evidence of breaking where it appeared that goods were abstracted by thrusting the arm through an opening in a structure, the party ²⁶⁴ either making or enlarging the opening for this purpose.

In *Donahoo v. State*, 36 Ala. 281, it was held that entering a house by means of a chimney was a sufficient breaking and entering to constitute burglary.

In *State v. Willis*, 52 N. C. 190, it was held that an entry at night through a chimney into a log cabin, and stealing goods therein, constituted burglary, although the chimney was made of logs and sticks, was in a state of decay, and not more than five and one-half feet high. It has been held that removing a post leaning against a door to keep it closed is sufficient breaking: *State v. Powell*, 61 Kan. 81, 58 Pac. 968. It has also been held that lifting the flap of a cellar door, usually kept down by its own weight, raising the sash of a window, shut down close, but not fastened, or pulling down an upper sash, kept in place alone by its own weight, or lifting a transom shutter, kept in place by its own weight, may each constitute a burglarious breaking: *Rex v. Russell*, 2 Eng. C. C. 377; *King v. Hymans*, 7 Car. & P. 441; *King v. Hall*, Russ. & R. 451. In *People v. Dupree*, 98 Mich. 26, 56 N. W. 1046, it appeared that the prisoner during the day had called at the house of the prosecutor and was admitted to the inside for the purpose of giving him some food; that while there he raised a window a very slight distance from the bottom, not enough to permit the body of a man to enter; and it further appeared that he returned after night and opened the window from the outside a sufficient distance to enable him to enter the house, and that he did enter and steal three ²⁶⁵ pairs of shoes. It was held that this was a sufficient evidence of breaking.

We are aware that there are several cases which hold that the raising of a window partly open is not breaking. We have no case in this state upon the subject. The only case which we have bearing even remotely upon the question is *Bass v. State*, 1 Lea, 444. In that case it appeared that the prisoner had raised a latch on a door not otherwise fastened. This was held to be sufficient evidence of a breaking.

We are of the opinion that the evidence in this case is sufficient to sustain the charge contained in the indictment. It seems to us a useless refinement to hold that the various instances above cited are sufficient evidence of breaking, and that the further raising of a window partly open is not sufficient evidence, when the opening in the window is enlarged by the person entering so as to make the aperture sufficient to admit his body. Here is a material change of the status, and the change is accomplished by the application of force.

Other points of error assigned were disposed of in an oral opinion, and need not be further noticed here.

We are of the opinion there is no error in the judgment of the court below, and it is affirmed.

The Opening of a closed door or the hoisting of a closed window may constitute a breaking within the meaning of the law of burglary: Grimes v. State, 77 Ga. 762, 4 Am. St. Rep. 112; State v. Howard, 64 S. C. 344, 92 Am. St. Rep. 804. But where a window or door has been left partially open, its further opening has been held not to be a breaking: See the monographic note to People v. Richards, 2 Am. St. Rep. 385.

HERCULES POWDER COMPANY v. KNOXVILLE, LA FOLLETTE AND JELICA RAILROAD COMPANY.

[113 Tenn. 382, 83 S. W. 354.]

MECHANICS' LIENS—Railroads—Explosives Used on Road-bed.—Explosives furnished for, and used in, blasting rock in tunnels and in grading a railroad are "materials," for which the materialman is entitled to a lien. (p. 845.)

MECHANICS' LIENS—Railroads—Notice.—If a contract is entire to furnish material for the construction of a railroad, and shipments of material are made thereunder as ordered, a lien for the entire amount will be created and perfected by giving the required notice within the time specified by statute after the date of the last shipment, although some of the shipments were made more than ninety days before such notice. (p. 846.)

MECHANICS' LIENS—Railroads—Notice.—The fact that the last shipment of material to a railroad subcontractor is not delivered, but is stopped in transitu because of the contractor's insolvency, does not affect the seller's right of lien for material previously furnished such contractor more than the statutory period of notice prior to the notice of a claim of lien, when such notice is given within ten days after the insolvency of the subcontractor. (p. 847.)

MECHANICS' LIENS—Railroads.—If material is delivered in good faith to a subcontractor to be used in the construction of a railroad, the materialman is entitled to a lien therefor in the absence of definite proof that the material was not so used. (pp. 850, 851.)

Shields, Cates & Mountcastle, for the powder company.

Cornick, Wright & Frantz and X. Z. Hicks, for the railroad company.

N. B. Morrill, for Cole & Company.

³⁸⁴ WILKES, J. This bill seeks to fix a lien upon the railroad company for the cost of powder and other blasting material furnished to construct the railroad and blast a tunnel on its line known as "Dossett's Tunnel."

³⁸⁵ Mason, Hoge & Co. had a contract with the railroad company to build the road, excavate the tunnel and furnish all the necessary material for that purpose. They sublet the excavating and boring of this tunnel to Cole & Company, who in terms agreed to do all the work and furnish all necessary material and labor for that purpose. Cole & Company made a contract with each of the complainant companies, to wit, the Hercules Powder Company and the Repauno Chemical Company, by which they agreed to buy from these companies all of the explosives and explosive supplies which would be required in the excavation or boring of said tunnel.

The powder company furnished under its contract four bills or lots—one October 13, 1902, amounting to \$2,200; one May 27, 1903, \$2,200; one July 8, 1903, \$480; and the last September 18, 1903, \$384.36.

Cole & Company paid on account \$721.46, leaving due \$4,543.90. All of the material bought by this company was used in the construction and boring of this tunnel.

The chemical company furnished in March, 1903, \$45,534.03 of explosive material, and Cole & Company paid it on account \$3,636.76, leaving a balance unpaid of \$897.36.

About October 1, 1903, Cole & Company announced to its creditors that they were insolvent, and could not complete their contract with the railroad.

On October 10, 1903, each of complainant companies notified the railroad company that they had furnished ³⁸⁶ explosive materials to Cole & Company, for which they had not been paid, as before stated, and that they claimed liens upon the railroad company for the amounts due them.

Upon the hearing the chancellor held that complainants had no lien for the explosive materials furnished Cole & Company as against the railroad, and dismissed the bill, and complainants appealed.

In the court of chancery appeals the majority of that court were of the opinion that explosives used in excavating a roadway through a tunnel in building a railroad was material within the meaning of the acts of 1883 and 1891, and that complainants under these acts were entitled to liens upon the railroad property, provided proper notices were given the railroad as provided by those acts.

It held, however, that Repauno Chemical Company had not given such notice, and was entitled to no lien, and that the Hercules Powder Company was entitled only to a lien for the explosives furnished Cole & Company within ninety days of November 10, 1903, when notice of the lien was given the railroad company; and under this holding adjudged the powder company entitled to a judgment for \$384.36.

The Hercules Powder Company assigns as errors that part of the holding and decree of the court of chancery appeals which finds and adjudges that it is only entitled to a lien upon the Knoxville, La Follette & Jellico Railroad Company's railroad and property for the blasting ³⁸⁷ materials furnished to Cole & Company within ninety days from November 10, 1903, the date of said notice, and that it is not entitled to a lien for the whole balance due to it for blasting materials furnished under its said contract with Cole & Company, amounting to \$4,543.90.

The court of chancery appeals found that G. H. Cole & Company agreed and contracted with the Hercules Powder Company to buy from it all of the explosives needed in the excavation of Dossett's tunnel under their contract with Mason, Hoge & Company; that said explosives were to be furnished in the quantities and as ordered by G. H. Cole & Company, and were to be paid for within thirty days after they were used; that the Hercules Powder Company actually delivered goods to Cole & Company under said contract on September 18, 1903, and that on October 10, 1903, the Hercules Powder Company gave the notices required by the acts of 1891 of the fact that it had furnished said material and claimed said lien.

It is assigned as error that under these facts the court of chancery appeals should have held, and erred in not holding, that the contract to furnish said blasting material was an entirety, and that the Hercules Powder Company had ninety days

from the date that the last material was delivered under said contract within which to give said notice, and that the giving of said notice on October 10, 1903, entitled the complainant to a lien for the full balance due to it for the material furnished as aforesaid, which is found by the court of chancery appeals to be the sum of \$4,543.90.

§§§ The Repauno Chemical Company assigns as error that part of the decree of the court of chancery appeals which finds and adjudges that it is not entitled to a lien upon the Knoxville, La Follette & Jellico Railroad Company's railroad and property for the balance due it for the materials furnished by it to Cole & Company, with which to excavate said Dossett's tunnel. It is claimed that said court should have held, and erred in not holding, that the Repauno Chemical Company was entitled to a lien upon said railroad company's railroad and property under chapter 220, page 29, of the acts of 1883, as amended by chapter 98, page 215, of the acts of 1891, and should have decreed, and erred in not decreeing, that complainant was entitled to have said railroad company's railroad and property sold for the satisfaction and payment of complainant's said claim.

The court of chancery appeals based its decree denying the Repauno Chemical Company said lien on the ground that it did not deliver any of said material within ninety days of the date of its said notice to the railroad company that it claimed said lien. With reference to the facts governing this claim the court of chancery appeals said: "The complainant Repauno Chemical Company made a contract with Cole & Company, as before stated, to furnish all the explosives and explosive supplies needed in their contract with Mason, Hoge & Company, and all the material actually furnished under this contract by the Repauno Chemical Company was shipped on March 9 and March ~~389~~ 17, 1903, to Cole & Company, and aggregated in value the sum of \$4,534.03. Under its contract with Cole & Company the powder used in each month was to be paid for by Cole & Company in the following month. Cole & Company are entitled to credit on said amount of \$3,636.76, leaving a balance due the Repauno Chemical Company of \$897.27.

"About October 1, 1903, Cole & Company announced to their creditors that they were insolvent, and could not complete their contract. At this time Cole & Company had ordered other goods from the Repauno Chemical Company under their contract with it, and said goods were in transit to Cole & Company. The delivery of the same, however, was stopped by the Repauno Chem-

ical Company upon receiving information that Cole & Company were insolvent, and they afterward sold to Mason, Hoge & Company."

The Repauno Chemical Company gave its notice October 10, 1903.

The complainants assign as error that part of the decree of the court of chancery appeals dismissing the bill as to the Repauno Chemical Company, and denying the Hercules Powder Company a lien for the full amount of the balance due it for explosive materials furnished to G. H. Cole & Company and in taxing complainants with a part of the costs.

It is contended that the court of appeals should have found and decreed, and erred in not finding and decreeing, that the complainants were entitled to a lien against the railroad and property of the Knoxville, La Follette ³⁹⁰ and Jellico Railroad Company for the full amount of the respective claims sued for by them in this cause, together with interest and all the costs of this cause.

The defendant, by its assignments of error, and in defending against complainants' assignments, raises the question whether the explosive supplies furnished by complainants constitute material within the sense and meaning of the statutes and laws of Tennessee relating to liens of furnishers of materials used in the construction of railroads as set out in the acts of 1883 and 1891.

The complainants rely for their liens upon the provisions of the acts of 1883, page 296, chapter 220, the first section of which is in the words and figures following: "Section 1. Be it enacted by the general assembly of the state of Tennessee, that where any railroad company contracts with any person or persons, for the grading of its roadway, the construction or repair of its culverts and bridges, the furnishing of cross-ties, the laying of its track, the erection of its depots, platforms, wood or water stations, section-houses, machine-shops or other buildings, or for the delivery of material for any of these purposes, or for engineering or superintendence there shall be a lien upon such railroad in favor of the person or persons with whom the railroad company contracts for the performance of the work, or the delivery of the materials to the amount of the debts contracted therefor, which lien shall continue in force for six months after the performance of the work or the delivery of the material, and until the terminal ³⁹¹ of any suit commenced within the time for its enforcement"; and upon the provisions of chapter 98, page 215, of the acts of 1891.

That act provides, in substance, as follows: "Section 1. Be it enacted by the general assembly of the state of Tennessee that section 3 of the act passed March 29, 1883, as referred to in the caption of this bill, the same being section 2778 of Milliken and Vertrees' compilation of the laws of Tennessee, be, and the same is hereby, so amended as to provide that hereafter every subcontractor, laborer, materialman or other person who performs any part of the work in grading any railroad company's roadbed," etc., "or for the delivery of material for any of these purposes, . . . all and every such person or persons shall have a lien on such railroad, its franchises and property for the value of such work and labor done or material furnished or services rendered as hereinbefore set out and specified, in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done."

In other words, the act of 1891 was passed for the express purpose of extending to all subcontractors and furnishers of material the same lien that was guaranteed by the act of 1883 to persons contracting directly with the railroad company.

For the railroad it is insisted that the term "materials," as used in these acts, means something which enters into the construction of the roadway and ³⁹² forms a part of it, and cannot be held to apply to such material as is consumed in constructing the roadway, and, being consumed, it constitutes no part of the roadbed or roadway after it is constructed.

We are of opinion that the general assembly intended to give persons who furnished materials for grading the roadbed a lien, as well as those who furnished such material as was used in the superstructure placed upon the roadbed after it was graded, such as cross-ties, culverts, etc.

The fact that the materials were consumed in the use, and were thus destroyed in the construction, we think does not deprive the furnisher of his lien. The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts.

It is difficult to see what other material than explosives could be used in boring a tunnel and grading a road through stone.

While the general definition of the word "materials," as given by the lexicographers, may not go to this extent, and there are some cases holding apparently a different doctrine, we think the word must be defined ³⁹³ in the connection and for the purposes for which it is used and intended to be applied.

In *Knapp v. St. Louis etc. Ry. Co.*, 6 Mo. App. 210, the court said: "The theory of statutory liens of this class [on railroads] is that the laborer or materialman is entitled to a certain beneficial interest or security in the structure whose value is increased by his labor and materials actually incorporated therewith."

Yet in the later case of the *Rapauno Chemical Co. v. Greenfield etc. Ry. Co.*, 59 Mo. App. 6, it was said, construing a Missouri statute similar to ours, as follows: "The rule to be deduced from the foregoing authorities is that, in order to maintain a lien for materials furnished, it is not necessary in all cases that such materials should actually have gone into the structure and formed a part thereof. It is sufficient if their use was necessary, and they were in fact used or consumed in the making of the improvements. Hence we think that the argument is unsound that the lien in the cases here must fail because the powder was entirely consumed, and therefore could not have been actually incorporated in the work. Such a construction of the statute we conceive to be a strained one, and not within its equity or spirit. What was said on this subject by the supreme court in the case of *Simmons v. Carrier*, 60 Mo. 581, must be read in the light of the particular facts of that case. There the claim was for lumber. The court held that a lien could not be maintained for such material unless it actually entered into the construction ³⁹⁴ of the building. This was undoubtedly a proper construction of the statute as applicable to lumber and such like materials to be used in or on the improvements; but, in our opinion, it is unreasonable to apply such a test to powder which is entirely consumed in its use": *Rapauno Chemical Co. v. Greenfield etc. Co.*, 59 Mo. App. 6.

The lien statute of Missouri (Rev. Stats. 1889, sec. 6741) reads as follows: "All persons who do any work or labor in houses, depots, bridges or culverts of any railroad company, incorporated under the laws of this state or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges or material to such railroad company, shall have for the work done and labor performed and for the material furnished a lien," etc.

The question under consideration has been before the New York courts: *Hazard Powder Co. v. Byrnes*, 21 How. Pr. 189. The statute of New York provides that any person who shall, in conformity with the terms of the contract between the owner and contractor, furnish to the contractor any materials in building any house or building shall have a lien on the improvement. In the case above cited the plaintiff claimed a lien for powder and fuses furnished the contractor for the purpose of blasting rock preparatory to laying the foundation walls for the defendant's building. In delivering the opinion of the court, Judge Hilton said: "I think that the fair and reasonable interpretation ³⁹⁵ of such language is that the right of a lien extends to all such materials as ordinarily enter into or are used in the construction of buildings, and which are in the express or implied terms of the building contract made between the owner and contractor: *Wood v. Donaldson*, 17 Wend. 550; *McDermott v. Palmer*, 8 N. Y. 383. Here the contract imposed upon the builder the duty of removing rocks from the surface of the land preparatory to laying the foundation walls, and hence the powder and fuses furnished became necessary for the purpose of blasting the rock and enabling the contractor to construct the contemplated building. Such materials, when thus impliedly contracted for, and actually furnished and used, must, I think, be classed within the list of things which are denominated in the lien law as 'materials in building,' and for which a lien may be acquired."

In Colorado there is a lien statute applicable particularly to mines, wherein it is provided that any person furnishing "timber or other materials to be used in or about the mines shall have a lien therefor." In *Keystone Min. Co. v. Gallagher*, 5 Colo. 23, one of the claimants had furnished powder, steel and candles, which were used in working the mine, and for which he claimed a lien on the mine. In disposing of the objections made to this claim the court said: "It is objected that the decree as to Boettcher's claim is erroneous, because the articles furnished by him were not of the character comprehended by the lien law, specifying ³⁹⁶ 'timber or other materials to be used in or about the mine.' The testimony shows that the articles furnished were powder, steel and candles for the use of the mine. These articles are as clearly within the meaning of the statute as anything we can conceive of essential to the working of a mine."

In the last edition of Mr. Elliott's work on Railroads, under the heading, "For what lien may be obtained," the rule is laid

down as follows: "The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road. Under such a statute it has been held that giant powder furnished to be used and used by the contractor in constructing the road is 'material' for the value of which a lien may be acquired; but a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials 'used in and about' the construction of the bridge. So, of course, groceries and food furnished for the workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them": Elliott on Railroads, p. 1597, sec. 1068.

All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's ³⁹⁷ roadway, and which are necessarily consumed in the use thereof; and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. The explosives which are necessarily consumed in the use are held to be liens, while the tools and equipment which constitute the contractor's plant do not constitute liens under the several lien statutes. This distinction is forcibly drawn and fully discussed in the case of Giant Powder Co. v. Oregon Pac. Ry. Co., reported in 42 Fed. 474, 8 L. R. A. 700. In that case the Giant Powder Company brought suit to recover the value of powder sold by it for use, which was used in the construction of the roadway of the Oregon Pacific Railway Company, and to have the same declared a lien upon the defendant's railroad and property under section 1 of the acts of the Oregon legislature for the year 1885.

In deciding that case, Judge Deady, of the United States circuit court, said: "Was this material 'used' in the construction of this section on this road, within the meaning of this statute?"

"In *Basshor v. Baltimore etc. R. R. Co.*, 65 Md. 99, 3 Atl. 285, cited by counsel for the demurrer, it was held, under a statute giving a lien on a bridge for all materials used 'in or about' its construction, that a person furnishing ³⁹⁸ a contractor with machinery wherewith to build a bridge could not have such lien.

"Admitting the correctness of this decision, as I do, the cases are not, in my judgment, parallel. The machinery and appliances furnished the contractor in that case, although 'used' in the construction of the bridge, did not enter into the structure and become a part of it. They were the contractor's 'plant,' and retained their identity and fitness for further use, saving the limited and gradual wear and tear incident to such use.

"This powder was not only 'used' in the construction of this road, but it was thereby necessarily consumed, and it was so intended. It was furnished to be so used in the construction of this road. Nice questions may arise as to whether material is 'used' in the construction of a road as a tool or plant simply, or so used and consumed as to entitle the furnisher to a lien on the result for its value.

"The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used. Masonwork may be done on a road in a dry country or season, when large quantities of water must be hauled many miles for the preparation of the necessary mortar. Upon the completion of the structure and the hardening of the mortar the water has as thoroughly disappeared as the powder after the blast. Again, lumber ³⁹⁹ may be used in the construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building, nor, so to speak, become a part of it. But, in my judgment, both it and the water have been 'used' in the construction of the building and masonwork, within the meaning of the lien law, and the purpose for which it was enacted.

"And so I think this powder was 'used' in the construction of this section of the road, whereby it was consumed not gradually and incidentally as a tool or part of a contractor's plant, but wholly and at once, in aiding to clear and fix the roadway for the reception of the ties and rails."

It may be that the statutes under which these decisions are made are somewhat broader than our own statute, but the principle involved is the same, and to such statutes the courts will give a liberal construction in favor of the laborer or material-man.

Thus, in *Bladen v. Railroad Co.*, 97 Tenn. 393, 37 S. W. 135, it was held, construing the act of 1891, that a bookkeeper of a bridge contractor and the cook and cook's helpers employed by

him for the bridge gang, had a lien on the railroad for salary and wages under the provision giving a lien to anyone who performs any valuable service, manual or professional, by which any railroad company receives a benefit.

We are of opinion, therefore, that explosives used in blasting rock in tunnels and in the grading of the road ⁴⁰⁰ are materials for which, under the act, the furnisher is entitled to a lien.

We pass now to the question whether complainants gave the notice which the statute requires.

The provision of the statute in regard to notice is: "Provided, that within ninety days after such work and labor is done or completed or such materials are furnished, or such services are rendered such subcontractor, laborer, materialman or other person or persons rendering the hereinbefore mentioned service shall notify in writing any such railroad company," etc.

The shipments by the Hercules Powder Company to Cole & Company were made as follows: October 13, 1902, \$2,200; May 27, 1903, \$2,200; July 8, 1903, \$480; and September 18, 1903, \$384.36. Only the last sale and shipment of \$384.36 was delivered within the ninety days next before the notice was given November 10, 1903.

It is evident that the account between the powder company and Cole & Company was a running account; that the powder was furnished from time to time as was demanded by Cole & Company; and the sales were not separate and distinct, but the contract was an entirety, to be performed by shipments from time to time as might be desired.

The whole of the explosives furnished by the Repauno Company was furnished before the ninety days. A shipment made within the ninety days was stopped in transit, and it is not in controversy in this case. On ⁴⁰¹ October 10, 1903, Cole & Company notified their creditors of their insolvency. At that time the Repauno Chemical Company had a shipment in transit to them, which was stopped only because of this insolvency. It was being shipped in pursuance of that company's contract to furnish the explosives, and if they had been received, the case presented would be identical with that of the powder company, as the Repauno Chemical Company gave their notice on the same day, November 10th.

We think that this contract must also be regarded as an entirety, and in each case the ninety days must be reckoned from the date of the last shipment in pursuance of the entire contract.

The fact that the last shipment was not delivered was due to the abandonment of the work by Cole & Kenton after notice of insolvency, and within ten days after the contract was terminated by the wrongful conduct of Cole & Kenton within ten days from the time when the last delivery would have been made but for their failure, the notice was given.

Under the construction given to this act by the court in chancery appeals with reference to the liability of lien of the complainants, in order to obtain a lien against the property it is necessary that furnishers of material should give notice of their claim within ninety days after they deliver a portion of the material of material, although they had an agreement with the contractor to furnish all of the material necessary to complete the contract. ⁴⁰² Not only this, but, carrying the construction forward to the other parties who are given lien by such acts, it would be necessary for the holder of a lien of a subcontractor in whose favor liens are provided by such acts to give notice within ninety days after the end of each day's work although they continue to work and had a contract to work until the whole contract was completed.

Section 3540 of Shannon's Code gives lien to furnishers of material for the erection of buildings and improvements on real estate, provided notice is given within thirty days of the notice of the property; and this court had held that the furnishing of material has thirty days after the last articles furnished for such improvements were delivered, or thirty days after the completion of the contract within which to give such notice: *Shannon v. Weaver*, 5 Lea, 393; *Green v. Williams*, 92 Tenn. 221, 12 S. W. 520, 19 L. R. A. 478; *Cole Mfg. Co. v. Fair*, 92 Tenn. 61, 12 S. W. 856.

In the case of *Basham v. Toore*, 51 Ark. 304, 12 S. W. 221, the supreme court of that state said: "Where a contractor abandons a contract when partially completed, the time for presentation of subcontractors' notice begins at the time of abandonment, and not from the completion of the building by the owner under another contract."

The contract in reference to notice, where the contractor is a surety, is laid down in Phillips on Mechanics' Liens, 2d ed., 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 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him for the bridge gang, had a lien on the railroad for salary and wages under the provision giving a lien to anyone who performs any valuable service, manual or professional, by which any railroad company receives a benefit.

We are of opinion, therefore, that explosives used in blasting rock in tunnels and in the grading of the road ⁴⁰⁰ are materials for which, under the act, the furnisher is entitled to a lien.

We pass now to the question whether complainants gave the notice which the statute requires.

The provision of the statute in regard to notice is: "Provided, that within ninety days after such work and labor is done or completed or such materials are furnished, or such services are rendered such subcontractor, laborer, materialman or other person or persons rendering the hereinbefore mentioned service shall notify in writing any such railroad company," etc.

The shipments by the Hercules Powder Company to Cole & Company were made as follows: October 13, 1902, \$2,200; May 27, 1903, \$2,200; July 8, 1903, \$480; and September 18, 1903, \$384.36. Only the last sale and shipment of \$384.36 was delivered within the ninety days next before the notice was given November 10, 1903.

It is evident that the account between the powder company and Cole & Company was a running account; that the powder was furnished from time to time as was demanded by Cole & Company; and the sales were not separate and distinct, but the contract was an entirety, to be performed by shipments from time to time as might be desired.

The whole of the explosives furnished by the Repauno Company was furnished before the ninety days. A shipment made within the ninety days was stopped in transit, and it is not in controversy in this case. On ⁴⁰¹ October 10, 1903, Cole & Company notified their creditors of their insolvency. At that time the Repauno Chemical Company had a shipment in transit to them, which was stopped only because of this insolvency. It was being shipped in pursuance of that company's contract to furnish the explosives, and if they had been received, the case presented would be identical with that of the powder company, as the Repauno Chemical Company gave their notice on the same day, November 10th.

We think that this contract must also be regarded as an entirety, and in each case the ninety days must be reckoned from the date of the last shipment in pursuance of the entire contract.

The fact that the last shipment was not delivered was due to the abandonment of the work by Cole & Company, and their notice of insolvency, and within ten days after the contract was terminated by the wrongful conduct of Cole & Company, and within ten days from the time when the last delivery would have been made but for their failure, the notice was given.

Under the construction given to this act by the court of chancery appeals with reference to the claims of both of the complainants, in order to obtain a lien under said act it is necessary that furnishers of material should give notice every time within ninety days after they deliver a wagon or a car load of material, although they had an agreement with the contractor to furnish all of the material necessary to complete the contract. ⁴⁰² Not only this, but, carrying this construction forward to the other parties who are given liens by said acts, it would be necessary for the laborer, or engineer, or superintendent in whose favor liens are provided by said acts, to give notice within ninety days after the end of each day's work, although they continue to work and had a contract to work until the whole contract was completed.

Section 3540 of Shannon's Code gives liens to furnishers of material for the erection of buildings and improvements on real estate, provided notice is given within thirty days to the owner of the property; and this court had held that the furnisher of material has thirty days after the last articles furnished for said improvements were delivered, or thirty days after the completion of the contract within which to give said notice: *Daniel v. Weaver*, 5 Lea, 393; *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520, 19 L. R. A. 478; *Cole Mfg. Co. v. Falls*, 92 Tenn. 607, 22 S. W. 856.

In the case of *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282, the supreme court of that state said: "Where a contractor abandons a contract when partially completed, the time for presentation of subcontractors' notice begins to run from such abandonment, and not from the completion of the building by the owner under another contract."

The contract in reference to notice, where the contract is an entirety, is laid down in Phillips on Mechanics' Liens, second edition, page 530, as follows: ⁴⁰³ "So where a party furnishes materials for a building at different times, but in pursuance of one contract, he is in time if he commence proceedings to establish his lien within the period allowed by the statute, counting from the date of the last act done in execution of the contract. As, where

persons made a contract in May, 1857, with machinists, for all machinery and materials required to build a mill, and received them all at that time excepting the bolting cloth, it being uncertain what kind of cloth would be needed, they informed the machinists that they would order it from them afterward, which was done, and received in the following September. The machinists commenced proceedings to enforce their lien within the statutory period counting from the last item, but not if from the former; and it was held that, as the cloth had been furnished under the same contract as the other materials, the proceedings were commenced in time to enforce the lien for the whole amount of materials furnished."

So where, in the fall of 1868, plaintiffs contracted with W. to furnish him lumber for the erection of a new dwelling-house and the repair of an old one, and they commenced furnishing lumber for that purpose the same season, and continued doing so until the last day of August, 1868. In August, 1868, W. became owner of a second lot immediately adjoining that first mentioned, and removed the old house upon it, and made the repairs on said house in the spring of 1869. In that spring, also, the contract for lumber was enlarged by ⁴⁰⁴ plaintiffs agreeing to furnish lumber to build a barn. It was held that for the purpose of enforcing the lien against W. it was but a single contract for the whole lumber, and the time within which it could be enforced was to be counted from the last delivery.

But it is said that the Repauno Chemical Company cannot recover, because all the material furnished by it was not used in the excavation of said tunnel by Cole & Company. It is true that Cole & Company did sell \$1,332 of explosives that had been furnished to them by the Repauno Chemical Company, and the court of chancery appeals so finds, but with reference to this sale the court of chancery appeals says: "The proof does not make it appear when this sale was made to Walton, Wilson & Company, and it also fails to show whether or not the explosives sold by Cole & Company to said Walton, Wilson & Company were paid for to the Repauno Chemical Company out of the actual cash paid by Cole & Company to said Repauno Chemical Company."

Section 1, chapter 98, page 215, of the acts of 1891, gives the lien claimed in this case to the materialman "for the delivery of material for any of these purposes" (that is, for any of the improvements in the act); and all that is necessary, it is claimed, to entitle the furnisher to a lien, is that he should prove that he

delivered said material to the contractor or subcontractor in good faith, to be used for any of the purposes provided for in said act.

In the case of *Stewart Chute Lumber Co. v. Missouri Pac. Ry. Co. et al.*, 28 Neb. 39, 44 N. W. 48, the supreme court of Nebraska, quoting their own act, and deciding the question now under consideration, said, in substance: Under Compiled Statutes of Nebraska of 1887, chapter 54, section 2, which provides that "when materials shall have been furnished or labor performed in the construction, repair and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such laborer and materialman, contractor or subcontractor, shall have a lien therefor," the lien of a materialman attaches upon the delivery in good faith of the material to the contractor or subcontractor, and it is not necessary that the material furnished should have been actually used in the improvement.

Plaintiff furnished lumber and other material to a subcontractor for the erection of shanty boarding-houses for his men and stables for his horses. These shanties and stables were not erected on the right of way, but at convenient points one hundred and fifty yards from the line of the road. Held, that the lumber and other materials so supplied was material furnished in the construction of the railroad within the meaning of the Nebraska statute, and that plaintiff was entitled to a lien therefor: See 39 Am. & Eng. Ry. Cas., 566.

The question presented upon this feature of the case is one of extreme difficulty. The act gives the lien "for the delivery of the material." It nowhere makes a condition that the material shall be used in the construction of the road. It clearly contemplates that the delivery ⁴⁰⁸ shall be in good faith for purposes of construction. But it does not require that the furnisher shall follow up his material, and see that it is actually used in the construction. To hold this doctrine would well-nigh defeat the lien, since the furnisher would be obligated with a duty which would be burdensome, if not impossible, to comply with.

On the other hand, it is a hardship to hold the road liable for material that it did not get the benefit of, and to fix the lien upon its property, although such material was neither used nor consumed upon it.

The question is rendered still more difficult in this case by the indefinite findings of fact by the court of chancery appeals. That court finds that not all of the material furnished by the Repauno Company was used upon the road, but that \$1,332 worth

of explosives furnished by them were sold by Cole & Company to Walton, Wilson & Company. They do not find that the explosives for which the present charge is made were not used in constructing the road. They do not find that Walton, Wilson & Company did not pay for the material they bought to Cole & Company, and that Cole & Company did not turn over the proceeds to the Repauno Company. So that we have no definite finding of fact that the explosives for which recovery is now sought were not used upon the road. Now, if the delivery alone is the act which gives the lien, the chemical company is entitled to their lien.

Our mechanic's lien law provides that every journeyman or other person employed by such mechanic, founder, ⁴⁰⁷ or machinist, to work on the buildings, fixtures, machinery, or improvements, or to furnish machinery for the same, shall have a lien, etc., and this court in construing this act said: "It is not the actual use of lumber in repairs to a building by the owner that gives the furnisher a lien, but the furnishing under a contract for that use, and the lien exists whether the lumber was used or not": *Daniel & Co. v. Weaver*, 5 Lea, 392.

That was a case, however, where the material was furnished to the lessee of a milldam, and the court held that the lien would extend to the leasehold interest but not to the owner's or lessor's interest in the premises. In that case the material was furnished to the party against whom the lien was sought, but here it was delivered to a subcontractor, who stood two removes from the railroad, against whom the lien was sought.

The question resolves itself into this: Who shall be responsible for the good faith of the subcontractor who buys the material, and to whom it is delivered—the furnisher, who sells the material, or the railroad, which expects to use it and receive benefit from it?

The subcontractor, while not the agent of the road, stands in the place of the railroad company as to the construction of the road, and does his work under the superintendence and direction of the road authorities. It is to be presumed that they will, better than anyone else, know what materials go into the construction of the road, and certainly better than the furnisher, who ⁴⁰⁸ never gets to the premises, and is not concerned further than to sell and get pay for his material.

In addition, the railroad has ample opportunity to protect itself against such defaults by taking proper bonds from its contractors, while if a furnisher were required to protect himself

by such bonds, it would prevent him in many, if not all, cases from making sales.

Without deciding this question, we are content to hold, under the findings of the court of chancery appeals, that this material for which the present action is brought was in good faith delivered to Cole & Company to be used on the railroad, and there is not definite proof that it was not so used.

The result is that both companies are entitled to the amount sued for and interest, and all costs, and for these amounts liens are declared, and a decree will be entered accordingly reversing and modifying the decree of the court of chancery appeals and the decree of the chancellor.

The Word "Materials," as used in a mechanic's lien law, has been held to include fuses and powder necessarily used in preparing a building site: See the monographic note to Chapin v. Paper Works, 79 Am. Dec. 275. Consult, in this connection, Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 198, 81 Am. St. Rep. 421.

Mechanics' Liens for materials furnished to be used, but not in fact used, are discussed in the note to Odd Fellows' Hall v. Masser, 64 Am. Dec. 678.

SLOVER v. COAL CREEK COAL COMPANY.

[113 Tenn. 421, 82 S. W. 1131.]

CREDITORS' BILLS—Corporations—Actions for Torts.—

Claims against a corporation based on unliquidated damages for torts alleged to have been committed by it cannot, standing alone, form any basis for a creditor's bill against such corporation. (p. 856.)

CREDITORS' BILLS—Corporations.—A bill quia timet cannot be maintained against a corporation having a large number of damage suits commenced against it, to place its assets in the hands of a receiver to be by him preserved for the benefit of the persons who may be successful in such suits. (p. 857.)

CREDITORS' BILLS—Corporations—Action for Torts.—A bill quia timet will not lie against a corporation to impound its property at the suit of one who has brought actions for damages against it on the ground that he fears that other judgments will be obtained and executions issue, which will exhaust the assets of the corporation before he can secure his judgment, or that the assets of the corporation will be otherwise dissipated before such time. (p. 858.)

RECEIVERS—Corporations—Dissipation of Assets.—Equity will not appoint a receiver for a corporation, at the suit of one who has simply brought an action for damages against it, on the ground that it is exhausting its assets and turning the proceeds into dividends in order to defeat plaintiff's claim and prevent him from collecting any judgment which he may obtain. (p. 858.)

RECEIVERS—Corporations—Actions for Torts.—The power of equity cannot be invoked in behalf of persons suing in tort, to the end that the property of the corporation may be held and managed by a receiver, to await the decision of such action at law to prevent waste of the corporate property in the meantime, with a view to having it ready to turn over in satisfaction of such judgment as may be obtained in the action at law. (p. 864.)

Webb, M'Clung & Baker and Ingersoll & Peyton, for the plaintiff.

C. T. Cates, Jr., R. E. L. Mountcastle and H. B. Lindsay, for the defendants.

⁴²³ NEIL, J. The bill in this case was filed by Parthena Slover, the widow of William H. Slover, and by L. Slover, the widow of J. B. Slover.

The bill charges, in substance, that William H. Slover and J. B. Slover came to their death in 1902, through an explosion in the Fraterville mine in Anderson county; that this explosion was caused by the negligence of the defendant company and E. C. Camp and G. N. Camp, officers ⁴²⁴ of the company; that over one hundred and eighty people were killed at the same time in the mine; that more than one hundred and fifty suits have been brought, and are now pending in the circuit courts of Knox and Anderson counties, to recover damages for the death of said persons; that the aggregate amount of the damages thus sued for exceeds \$1,000,000, a sum in excess of all of the assets of the defendant company; that the suits of complainants were not among the first brought; that perhaps one hundred actions antedated their suits; that it is therefore probable that many judgments for damages will, in the due course of proceedings at law, be obtained before they recover judgment; that if the ordinary course of law be pursued, several hundred thousand dollars of assets will be required to satisfy such preceding judgments, and this will, in all probability, exhaust all of the assets of the defendant company, and that nothing will be left for the complainants.

It is further alleged that the defendant company is the owner in fee of only a very small amount of real estate, if any; that the total value of real estate supposed to belong to it is less than \$50,000; that the chief assets of the defendant company consist of leases and mining privileges in certain coal lands owned by other persons, with certain railway rights and privileges which yield large revenues; that complainants believe and fear that at the time when defendant's property, in due

course of law, shall be brought to sale for the satisfaction of such judgments as they may recover, the same will realize less than \$100,000; that they will thus be deprived of realizing anything upon their hoped-for recoveries.

⁴²⁵ The bill further alleges "that complainants are informed and believe that the said defendant company is now mining upon said property leased by it more than seven hundred tons of coal daily, all of which is sold under a permanent contract with the Southern Railway Company for its own supply of fuel, and that its profits for each ton of coal thus sold is fifteen cents; that thus the net profits upon each day's operation of said Coal Creek Coal Company is fully \$100; that this contract with the Southern Railway Company does not consume the entire product of the defendants' operations, but, as complainants are informed and believe, said defendants sell a large quantity to other consumers, so that usually the annual profits of this contract with the said railway company amounts to \$30,000 of steady revenue to the defendant company, and its sales to other persons aggregate a profit of about \$20,000 additional, thus making their annual net profits fully \$50,000."

The bill further alleges that the defendant company has a large revenue from the rent of its houses to miners.

The bill further proceeds: "The only other asset belonging to said defendant from which complainants and said other plaintiffs can expect payment of their just claims consists of the mines which are located on coal lands belonging to the Coal Creek Mining and Manufacturing Company, and leased from that company by the Coal Creek Coal Company; that the coal in the leased ⁴²⁶ lands constitutes its only value, and the land will become valueless when the coal is taken out of it.

"Complainants are informed, believe and charge that the Coal Creek Coal Company has, since said actions at law were begun, declared it to be its policy to delay said suits as long as possible, and draw the coal out of said mines as rapidly as possible, and pay the profits out in dividends to its stockholders; so that when recoveries shall be had in said actions at law there will be nothing but an empty shell for your complainants and said other plaintiffs in said actions to make their money out of, and said company is now doing this.

"As hereinbefore stated, said mine explosion occurred on May 19, 1902. Immediately thereafter E. C. Camp, who owned over fifty per cent of the \$200,000 of capital stock of the Coal Creek Company, and his brother, G. N. Camp, who owns more than

\$25,000 of the stock of the said company, conceived the plan of delaying the said actions at law as long as possible, and in the meantime of working out and exhausting the coal in the said mines as rapidly as possible, and with this purpose and end in view, so complainants aver and charge, that they did, within seven days after the occurrence of said mine disaster on May 26, 1902, declare and pay out to themselves and the other stockholders a dividend of \$10,000, and they did, on October 14, 1902, declare and pay out a second dividend, amounting to \$16,000, and that on December 2, 1902, they declared and paid out a third dividend of \$20,000, thus making a total of \$46,000 paid out in dividends ⁴²⁷ between May 26 and December 31, 1902, and they had, just previous to said mine disaster on March 27, 1902, declared and paid out a dividend of \$20,000, making a total of \$56,000 in cash paid out in dividends during the year 1902.

“Your complainants further aver and show, upon information and belief, that said Coal Creek Coal Company and its stockholders are now engaged as rapidly as possible in robbing said mines, that is, not mining them in such a way as to produce the greatest ultimate profit out of the coal therein, and are drawing the pillars and otherwise mining said property in such a way as to produce the greatest profit in the shortest possible space of time; and complainants aver that they are doing this in pursuance of their fixed plan and policy and design to reduce to cash the assets of said company as quickly as possible, and pay the same out in dividends among the stockholders, so as to leave no funds or assets with which to pay the judgments which will be obtained against the defendant company by your complainants; and complainants are further informed, believe, and charge that the Coal Creek Coal Company and its stockholders, if permitted to mine out such coal at the rapid rate at which they are now exhausting same, will mine out the entire body of the coal in the lands covered by their leases within the next four years, or five years at most.”

The bill further alleges: “That complainants are informed, believe and charge that the lease from the Coal ⁴²⁸ Creek Mining and Manufacturing Company to the defendant Coal Creek Coal Company, under and by virtue of which said defendant holds and operates the mines, provides that, in case execution shall be levied upon the same, the lessor shall have the right to declare said lease terminated, and resume possession of said leased premises. This provision was, no doubt, inserted for

the purpose of preventing the working of said mines and the payment of royalties to the lessor from being stopped; but the operation of said mine by a receiver of your honor's court would not stop the work of said mines and the payment of royalties. If, however, complainants and the other plaintiffs in said actions at law must wait until they recover judgments at law, and then levy upon said leasehold, the lessor may instantly terminate the defendant's title and defeat complainants altogether in the collection of their claims."

The bill does not charge any debts to exist, but only the several actions for damages above referred to. Speaking in respect of these claims for damages so preferred, the bill charges as follows: "Complainants charge, in view of the heavy liabilities hereinbefore mentioned (those involved in the damage suits), and the smallness and character of its assets, that said defendant, Coal Creek Coal Company, is insolvent, and should be wound up as an insolvent corporation in this court and in this cause."

The bill prays that it may be taken and maintained as a general creditors' bill filed in behalf of the present ⁴²⁰ complainants, and in behalf of the plaintiffs in all the other actions at law, and in behalf of all the creditors of the corporation; "that a receiver be appointed at once to take charge of all the assets of the defendant, Coal Creek Coal Company, and operate said mines, and collect the rents of said other lands and the houses on the said defendant, Coal Creek Coal Company, and any and all other property belonging to said defendant, and to preserve said property and all the rents and income thereof until adjudications of the rights of said parties shall be made; that an order be made assuming jurisdiction of this bill as a general creditors' bill to wind up the defendant as an insolvent corporation for the benefit of complainants and said other plaintiffs in said actions at law; that said plaintiffs in said actions at law shall be permitted to prosecute their said suits to final judgments, but requiring them to file transcripts of such judgments in this cause for payment, and inhibiting and enjoining them and all other creditors and claimants from otherwise suing the said defendants or attempting to subject the property and assets of said defendant by levy or otherwise except in this cause and in this court; that, owing to the peculiar character of said mining property, the receiver be required to operate same and accumulate a fund for the ultimate payment of the claims of complainants and other claimants, that all such orders, decrees and pro-

ceedings may be made, pronounced, and had as shall be necessary and ⁴³⁰ proper to effect the objects and purposes of this bill," and for general relief.

The company demurred to the bill, and made therein the following points: 1. That it contains no equity on its face, in that it appears the defendant is a going concern, and solvent, and no liabilities are shown against it except such as set forth in the damage suits, which liabilities are not admitted by the company, but are shown to be denied and contested; 2. That complainants' bill is unknown to the forms of law; 3. That no cause of action is found in the allegations that the defendant company is mining coal and dividing the profits among its stockholders, nor in the fact that its lessor will have the right to take possession of the property in case execution should be levied upon the leasehold interest which the defendant company obtained from the said Coal Creek Mining and Manufacturing Company; 4. That the bill charges that the other two defendants, the two Camps, are liable, and does not allege that they are insolvent, and hence, if there be any right of recovery, it appears from the bill that the judgments may be collected out of said two defendants. We have omitted one of the grounds of demurrer, which refers to an allegation in the bill which we have also omitted, concerning the finding of the coroner's jury, such finding being wholly beside the present inquiry.

In disposing of the foregoing grounds of demurrer we shall not take them up seriatim but in such order as may ⁴³¹ seem the most convenient; nor shall we discuss the last one.

It is obviously true that claims against a corporation based on unliquidated damages for torts alleged to have been committed by it cannot, standing alone, form any basis for a creditors' bill in equity against such corporation. This is too plain to need the citation of authority. If the rule were otherwise, it would be within the power of any designing person to wreck a corporation by suing it for a tort and laying the damages high enough in the writ or summons and declaration to more than cover all of its assets. Such a case cannot be brought within the scope of the rule asserted by some authorities that a creditor by judgment (*Union Mrt. Life Ins. Co. v. Union Mills Plaster Co.* (C. C.), 37 Fed. 286, 3 L. R. A. 90, 94), or even a simple contract creditor (2 *Morawetz on Corporations*, 797, 860), may, under proper allegation, sue out an injunction and obtain the appointment of a receiver to prevent waste and misapplication of the assets of a corporation, when such waste imminently imperils the collection of his debt.

It is clear from the face of the bill that the only purpose for which the injunction was sought was to prevent the interference of other persons with the property asked to be placed in the hands of a receiver, pending the winding up of the corporation and the distribution of its assets under the supposed general creditor feature of the bill.

Likewise there can be no doubt that the chief purpose ⁴²² of the bill was to obtain the appointment of a receiver in order that the court might, through such receiver, hold and administer the property of the corporation, and have it ready to hand over to the plaintiffs in sundry suits at law, upon final judgment having been pronounced in all of the one hundred and fifty-odd suits pending against the corporation in the circuit courts of Anderson and Knox counties; and this, too, when it is not alleged that the corporation owes any debts whatever, or that there is any ground for supposing its insolvency except the fact that a large number of damage suits have been brought against it, and that the amounts claimed in the various writs and declarations in the aggregate exceed the total assets of such corporation.

The counsel for the complainants do not cite any authority for such an extraordinary bill, and after a very extended examination of the subject, we have not been able to discover any.

Counsel say in the brief that they rely upon the principle that supports bills quia timet. We are not aware that this principle has ever been extended so far as it is now sought to extend it. One ground alleged for fear of loss to the complainants is that in earlier suits judgment and execution will be obtained prior to the obtention of judgment and execution in behalf of the complainants, and that by levy of such prior executions the leases under which the defendant conducts its mining business will be forfeited, or, at all events, the assets of the defendant will be consumed thereby, and there will ⁴²² be nothing left for the complainants. This is no ground for impounding the property of the defendant. If the fears of creditors were good reasons for impounding the property of debtors, not many debtors would be out of the hands of the courts. And how great the injustice of such a rule would be when it is left to the supposed creditor, as in damage suits, to himself fix the presumptive amount of liability by the mere act of stating it in his writ and declaration.

Another ground for fear alleged is that the defendant company is using its best energies toward working out the leases, and is distributing the avails as profits among its stockholders,

and that the mines will be exhausted by this process, and in the pockets of the stockholders in the form of dividends, before the complainants can obtain a judgment. It is alleged that the purpose of the defendant is to so exhaust the mines in order to defeat the complainants and other persons having damage suits. If there be any relief for the complainants on this state of facts—a point which we should not undertake to decide in the present case—it would be by attachment at law, the only forum that can try a suit for unliquidated damages to persons or property, and not by application to a court of equity for the appointment of a receiver to take charge of the assets of the company.

As we have said, really the only object of the bill is to have a receiver appointed to take charge of the assets of ⁴³⁴ the defendant corporation, a solvent concern, hold and administer those assets pending the litigation of the damage suits in the circuit courts referred to, and to have them ready for distribution among the several plaintiffs in these suits when they shall all have been brought to a close, or for distribution among such of them as shall obtain judgments against the defendant.

Our statutes upon the subject of appointing receivers, so far as they have any bearing at all upon the phase of the subject under examination in the present case, are as follows:

“The courts of this state are all vested with power to appoint receivers for the safekeeping, collection, management and disposition of property in litigation in such courts, whenever necessary to the ends of substantial justice, in like manner as receivers are appointed in courts of chancery”: Shannon’s Code, sec. 5549.

“The party in whose favor a judgment or decree is rendered against a corporation may sue out a *distringas* or *fieri facias*, to be levied as well on the choses in action as on the goods, chattels, lands and tenements of the corporation, and, in case of a levy on choses in action, the court may appoint a receiver to collect the same”: Shannon’s Code, secs. 4730, 4765.

“An action lies under the provisions of this chapter, in the name of the state against the person or corporation offending in the following cases: . . . 3. When any persons act as a corporation within this state, without being authorized by law; 4. Or if being ⁴³⁵ incorporated, they omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation; 5. Or exercise powers not conferred by law; 6. Or fail to exercise powers conferred by law and essential to the corporate existence”: Shannon’s Code, sec. 5165. “The court is au-

thorized, upon the filing of the bill, properly verified, in all proper cases, to grant attachments and injunctions, and appoint receivers to effect the ends of justice, and to make all such orders, rules and decrees according to the practice of a court of chancery, as may be necessary to accomplish the objects had in view": Shannon's Code, sec. 5173. "If it be adjudged that a defendant corporation has, by neglect, nonuser, abuse or surrender, forfeited its corporate rights, judgment will be rendered that it be altogether excluded from such rights and be dissolved; and also that the corporation, its directors or managers, as the case may be, pay the costs": Shannon's Code, sec. 5181. "Such judgment of dissolution does not extinguish the debts due to or from the corporation; but the court shall appoint a receiver, with full power to take possession of all the debts and property, and sell, dispose of, collect, and distribute, the same among the creditors and other persons interested, under the orders of the court": Shannon's Code, sec. 5182.

And, in addition, it may be said that courts of chancery in this state have, from the earliest period of their existence, without special reference to the foregoing statutes, assumed to exercise all the powers that courts ⁴³⁶ of chancery generally exercise in respect of the matter of appointing receivers.

The general and well-nigh universal rule is that receiverships are only provisional, or auxiliary to the main purpose of an action; and that, if the jurisdiction exist to make the appointment of a receiver the chief purpose of the action, it is rarely exercised: *Vila v. Grand Island etc. Co.* (Neb.), 97 N. W. 613, 63 L. R. A. 791; *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009, 15 South. 33, 23 L. R. A. 531; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122; *French Bank Case* (*La Societe Francaise v. Fifteenth Judicial Dist. Ct.*), 53 Cal. 495; *Jones v. Bank of Leadville*, 10 Colo. 465, 17 Pac. 276; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Smith on Receiverships*, sec. 13; *Spelling on Private Corporations*, sec. 851; 23 Am. & Eng. Ency. of Law, p. 1001.

In the first cited case—*Vila v. Grand Island etc. Co.* (Neb.), 97 N. W. 613, 63 L. R. A. 791—there is a full and able discussion of the question, with a copious citation of authorities both in the original opinion and in the opinion delivered on the petition for rehearing. In the latter it is said: "In the former opinion it was held that a receivership is a purely auxiliary remedy, and cannot be maintained in a proceeding instituted

solely for that purpose. The enunciation of this proposition is vigorously challenged by appellee's counsel, but a full investigation and consideration of the subject has dispelled from our ⁴³⁷ minds all doubts, if any have heretofore existed, as to its being a correct and sound exposition of the principles of equity governing and controlling a suit when applied to a condition of facts such as are presented by the record in the case at bar. Of course, when the statute authorizes it, and in some well-recognized exceptions to the general rule, the appointment of a receiver may be and is the main object and purpose of the suit or proceedings. It is likewise true that in some cases of extraordinary character affecting quasi public corporations, and where public interests are so involved as to demand the extension of the equitable principles applicable to receiverships so as to protect such interests, some courts have assumed jurisdiction, and claim authority to appoint a receiver when that is the main purpose of the suit; yet such cases have been characterized as announcing a doctrine both novel and unusual. In all such cases the object of such appointment is to preserve and hold intact the property intrusted to the receiver, and not to destroy, dismember, or by receiver's sale to dispossess the corporation of its property and franchises."

In *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, the supreme court of Missouri said: "That a court of equity has no inherent power, except in some few cases of particular jurisdiction, to appoint a receiver, except as an incident to and in a suit pending, has hitherto, with the exception of the *Wabash Case*, 29 Fed. 618, been a universally accepted ⁴³⁸ doctrine; and outside of that case the doctrine that a court of equity, without statutory authority, has jurisdiction, upon the application of an insolvent corporation, to take charge of and administer its affairs through a receiver, not only has no support, but whenever suggested has been repudiated. The following are a few of the many authorities that might be cited in support of these positions"—citing *Jones v. Bank of Leadville*, 10 Colo. 465, 17 Pac. 276; *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Smith v. Los Angeles Super. Ct.* 97 Cal. 348, 32 Pac. 322; *Hugh v. McRae, Chase*, 466, Fed. Cas. No. 6840; *People v. St. Clair Cir. Judge*, 31 Mich. 456; *Kimball v. Goodburn*, 32 Mich. 11; *French v. Gifford*, 30 Iowa, 160; *Whitehead v. Wooten*, 43 Miss. 523; *Ex parte Whitfield*, 2 Atk. 315; *Wait on Insurance Corporations*, sec. 183; *Gluck & Becker on Receivers of Corporations*, sec. 27.

The nature of the Wabash case is thus stated in the opinion just quoted from in an excerpt from *Central Trust Co. v. Wabash etc. Ry. Co.* (C. C.), 29 Fed. 618, wherein Treat, J., states the nature and origin of the proceeding as follows: "In order that this matter may not be misunderstood, for it is important in its vast reaching consequences, it should be stated that it was not an application by a mortgagee to foreclose. It was an application by the corporation itself, concerning which a great deal of comment has been made elsewhere. The application was originally made to myself in this circuit, which is limited in extent. I hesitated. I found that Judge ⁴³⁹ Shipman, a very learned and able judge, had gone over in extenso that class of thought. After further consideration with respect thereto, I reached the conclusion that his views were correct, to wit: 'Here is a vast system, extending through many states and many judicial districts. A default it was certain would have been made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for conservation of these interests—stockholders, bondholders, creditors at large,' etc. And after patient thought, I reached the conclusion that brother Shipman was right."

The cases of *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, *State v. Second Judicial Dist. Ct.*, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392, *Columbia Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407, 40 N. E. 914, 28 L. R. A. 727, and *Supreme Sitting of the Order of Iron Hall v. Baker* 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210, have been referred to as falling within the exception.

We hardly think, however, that all of these cases can be so classed. The first was a case where a court of equity assumed jurisdiction to wind up a corporation at the suit of a minority stockholder and, as incidental thereto, to appoint a receiver, with an order for an accounting, where the corporation had utterly failed of its purpose because of fraudulent mismanagement and misappropriation of its funds in the interest of one who ⁴⁴⁰ owned a majority of the stock, some of which was held by directors who were "dummies" under his control. The chief question discussed was whether courts of equity possessed the power to wind up a corporation in the absence of statutory authority, and it was held that the power existed under the facts stated.

The second case cited is nearer the point. The proposition announced in that case was that a receiver of a corporation

might be appointed on the application of minority stockholders, pending the investigation of charges of outrageous frauds on the part of the majority stockholders and managers in a suit for an injunction against the negotiation of enforced or fraudulent obligations created by them, and for other relief, although the latter did not extend to the winding up of the corporation. Distinguishing this case from the case of the French Bank and kindred cases cited *supra*, the court said: "In the California case an important element of the decision, as it appears, was that the appointment of the receiver acted as a dissolution of the corporation. In the case at bar no such result is intended by the order appointing the receiver, or is accomplished by that order. It is true that the complainant in the case in the district court asks for a dissolution of the corporation, but whether such relief may be granted in that action is not now before us for review. The complainant also asks for another relief, as set forth in the statement, namely that the negotiation of the notes ⁴⁴¹ described be restrained, that the foreclosure of the mortgage be prohibited, and that the notes and mortgage be declared null and void. While the determination of these matters is pending in the action the receiver is to act. His appointment is *pendente lite* only, and he is authorized to do only those acts which are peculiarly *pendente lite*. . . . The receiver is not to wind up the affairs of the corporation under his appointment. He is simply to manage the affairs of the same while charges of the most outrageous frauds by the managers and controllers of the corporation are being investigated in the trial of the action."

In *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407, 40 N. E. 914, 28 L. R. A. 727, it appears that a bill was filed for the dissolution of a corporation on the ground that it had forfeited its franchise, and for an injunction to restrain in the meantime the exercise of the franchises claimed, and for a receiver to take charge of the property until the further order of the court. As a ground for the appointment of the receiver it was alleged that, unless a receiver should be appointed, the defendant below, the athletic club, which had been unlawfully promoting prizefights, would falsely and fraudulently assign its rights and property to certain coconspirators so that prizefighting and other unlawful acts might be still conducted, notwithstanding the order of the court granting the injunction. Concerning the receivership which was granted in the court below, and which action was made the subject of attack in the supreme court, the latter court said: ⁴⁴² "If equity may so in-

terpose, certainly it may make its interposition effective. As shown by the information, the injunction if issued would not, of itself, have been sufficient to restrain the nuisance without the aid of the receivership. But equitable remedies must be complete. The arm of equity is not shortened, but will reach out to secure full right in the premises. The receivership being therefore necessary in order to secure the full effect of the injunction, equity will not refrain from the appointment of a receiver for such purpose. The receivership in this case is not necessarily for the sequestration and sale of the property, but only to take charge of the same until the further order of the court, and in aid of the injunction."

The case of *Supreme Sitting of the Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128, went off on a construction of an Indiana statute, and need not be further referred to. There is, however, a valuable note (20 L. R. A. 210-214) appended to this case, containing a large collection of authorities. In this note the annotator recognizes the prevailing doctrine as above stated, but cites certain exceptions thereto, as follows, viz.: That the appointment of a receiver may be made the main purpose of an action when a corporation ceases to exist, or abandons its business, and neglects to elect its officers, and there is no one to administer or care for its effects (citing *Smith v. Danzig*, 64 How. Pr. 320; *Lawrence v. Greenwich F. Ins. Co.*, 1 Paige, 587; *Crumlish's Admr. v. Shenandoah Valley R. Co.*, 28 W. Va. 623; *Finney v. Bennett*, 27 Gratt. ⁴⁴³ 365; *Buck v. Piedmont etc. Ins. Co.*, 4 Hughes, 415, 4 Fed. 849; *Stark v. Burke*, 5 La. Ann. 740; *St. Louis & S. Coal etc. Co. v. Edwards*, 103 Ill. 472; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 43 Fed. 204); or where there is such a dispute among the members of a governing body as prevents the affairs being carried on properly (citing *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303; *Shepherd v. Oxenford*, 1 Kay & J. 491); or for the protection of creditors where there is danger of irreparable loss, and a receiver is necessary to protect their rights (citing *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Conro v. Gray*, 4 How. Pr. 166; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887, 31 L. ed. 694; *Kennedy v. St. Paul & P. R. Co.*, 2 Dill. 448, Fed. Cas. No. 7706).

It was at an early day held in this state that a court of chancery had power to appoint a receiver until administration could be granted, where the right of administration was in liti-

gation, or other impediment existed: *Smiley v. Bell*, Mart. & Y. 378, 380, 17 Am. Dec. 813. It has also been held that pending litigation over the probate of a will, and during the interval before an executor or administrator is appointed, a court of equity may appoint a receiver of personal property and of the rents and profits of the realty, where there is danger of loss, misuse or misapplication: 23 Am. & Eng. Ency. of Law, 2d ed., p. 1015, and cases cited; ⁴⁴⁴ or for the estate of an infant when there is no guardian or trustee (23 Am. & Eng. Ency. of Law, 2d ed., p. 1016); or for the estate of an idiot or lunatic, pending the return or decision upon the inquisition of lunacy: 23 Am. & Eng. Ency. of Law, 2d ed., p. 1016.

Thus it appears that, while there are some exceptions, both as respects corporations and the estate of private individuals, to the rule that the appointment of a receiver in equity is merely auxiliary to a pending litigation, and that such action may occasionally be the object of the suit itself, and that as to corporations the power may, under some peculiar states of fact, be invoked in behalf of creditors, yet such creditors must generally be judgment or lien creditors (*Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216, 38 L. R. A. 122; *Union Mut. L. Ins. Co. v. Union Mills Plaster Co. (C. C.)*, 37 Fed. 286, 3 L. R. A. 90, 94; 5 Thompson on Corporations, sec. 6839), or at least creditors by contract: 5 Thompson on Corporations, sec. 6840; 2 Morawetz on Corporations, secs. 797, 860. We know of no authority, and have not been able to discover any, in which the power has been invoked in behalf of persons suing in tort, to the end that the property of a corporation may be held and managed by a receiver in a court of chancery to await the decision of such actions to prevent waste of the corporate property in the meantime, with a view to having it ready to turn over in satisfaction of such judgments as may be obtained in such action at law. Nor do we think, on principle, that the power of the court to appoint receivers should be or could be directed to such ⁴⁴⁵ use. And it is certainly true that the danger of waste would have to be made to appear very clearly, and shown to be imminent, before the court would in any case, in behalf of contract creditors even, be justified in taking the management of a presently solvent, going concern out of the hands of the directors and managers chosen by its stockholders, and placing it in the control of a receiver of the court.

For the reasons stated, we are of the opinion that the first and second grounds of demurrer are well taken, and that the court of chancery appeals acted correctly in dismissing the bill. The decree of that court is accordingly affirmed.

Demands Which Will Support a Creditor's Bill are discussed in the monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 271-290.

Grounds for the Appointment of a Receiver are discussed in the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 29-97. Generally, a receiver can be appointed, according to *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, only in cases already pending between the parties. A proceeding for the appointment of a receiver is but ancillary or auxiliary to the main action: *Sheridan Brick Works v. Marion Trust Co.*, 157 Ind. 292, 87 Am. St. Rep. 207.

MEE v. MEE.

[113 Tenn. 453, 82 S. W. 830.]

DEEDS—Parol Trusts—Evidence.—A trust may be impressed upon property held under a deed absolute upon its face, by parol evidence of an agreement made at the time that the deed was executed, that the property should be held and impressed with such trust in favor of a third person, not mentioned in the deed. (p. 866.)

DEEDS—Parol Trusts—Evidence.—If a deed absolute on its face, by its terms confers upon the grantee discretion to dispose of the land free from any trust, evidence is not admissible to establish a trust by showing a parol agreement to hold the land for that purpose. (p. 866.)

DEEDS—Parol Trusts—Evidence.—If a deed, absolute on its face, confers on the grantee discretion to dispose of land as he pleases, parol evidence is inadmissible to establish a mandatory trust agreed upon at the time of the execution of the deed, and thus contradict the terms of the deed. (p. 870.)

Cook, Swaney & Cook and Mayfield & Son, for the complainant.

J. C. Ramsey, for the defendant.

⁴⁵⁴ **WILKES, J.** The bill in this case seeks to set up a trust and beneficial ownership in a tract of land held by the defendant, Frances T. Mee, under a deed from her husband, Columbus A. Mee, which upon its face has no declaration or expression of trust. It is sought to impress this trust and set up the beneficial interest by parol proof. The habendum part of the deed, which is the only part necessary to be specially noted, is in these words: "To have and to hold said lands herein conveyed unto

the said Frances T. Mee, herself and her lawful assigns forever in fee simple, and said Frances T. Mee is hereby authorized and empowered to sell, to dispose of and convey any or all of said property by sale or by will, ⁴⁵⁵ or otherwise, as she may see fit to do, and for such purposes as she may deem best."

The contention is that Columbus A. Mee, when he made this deed, intended that the property should be held in trust by his wife, the grantee, for the benefit of his nephews, Columbus A. Mee and Paul Mee, and that there was an agreement upon her part that upon his death she would convey the same to them. It is properly conceded that a trust may be impressed upon property held under a deed absolute upon its face by parol proof of an agreement made at the time the deed is executed that the property should be held and impressed with such trust: *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Thompson v. Thompson* (Tenn. Ch. App.), 54 S. W. 145, and authorities there cited. But it is said that it is not competent or allowable to set up such a trust in opposition to the provisions of the deed. In other words, if the deed, upon its face and by its terms, is absolute, and conveys to the grantee a fee simple estate, without more, the trust character can be shown by parol, because this would not in any way contradict the terms of the deed. But if the deed contains provisions which expressly or by clear imputation give the grantee a power or discretion to defeat the trust, or are inconsistent with it, then the trust does not exist in such shape as to be mandatory upon the grantee.

To illustrate still further, and at the same time present the exact point of controversy in the case, it is conceded that if the deed to Mrs. Mee had contained the ⁴⁵⁶ usual habendum clause of a fee simple deed, without more, then parol proof would be competent to show that, while the deed was in form a fee simple conveyance, still it was impressed by an unexpressed agreement with a beneficial trust in favor of a third person not mentioned in the face of the deed.

But if the deed, after conveying a fee simple estate, contains provisions which confer upon the grantee discretionary power to defeat the trust, then parol evidence is not competent to defeat these provisions, and the deed cannot thus be altered or contradicted, or its provisions modified or impressed with any character or trust inconsistent with the provisions of the deed.

The real question in the case, which presents itself, is whether this deed, upon its face, contains any provisions or stipulations inconsistent with the trust attempted to be set up, and whether

the imposition of such a trust would be a contradiction of the terms of the deed.

We are of opinion, if this deed contained the usual habendum clause of a fee simple deed, it would be competent by parol to superimpose upon it a trust in favor of third persons. We speak now of the competency, and not of the sufficiency, of such parol evidence: *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Hall v. Livingston*, 3 Del. Ch. 373; *Brison v. Brison*, 75 Cal. 533, 7 Am. St. Rep. 189, 17 Pac. 689; *Shelton v. Shelton*, 58 N. C. 295; *Patton v. Beecher*, 62 Ala. 585.

But we are of opinion that the deed in controversy is ⁴⁵⁷ not such a fee simple deed, without conditions or limitations. The provision that the grantee is "authorized and empowered to sell, to dispose of and convey, any and all of said property by sale or by will, or otherwise, as she may see fit to do, and for such purposes as she may deem best," is totally inconsistent with a mandatory trust upon the grantee to convey it otherwise than at her discretion, and for such purpose as she may deem best.

That she has the power to convey by deed or will to the complainants is plain, and we think it equally plain that she has the discretion, coupled with the power, not to convey it to them, but to dispose of it otherwise, as she may see fit, and for such purposes as she may deem best.

If this be the proper construction of the provisions of the deed, then we are of opinion that parol proof is not competent to change, alter, modify, or nullify these provisions, or to defeat such discretion.

The general principle that parol proof will not be allowed to change, alter or contradict the terms of a written instrument is admitted, and is, we think, clearly applicable. It follows that even if parol proof should be allowed to show that Mrs. Mee at one time or frequently had agreed with her husband to hold this property in trust for, and to convey it to, his nephews the complainants, still the deed, when written, gave her the option or discretion to do so, or not, as she might see fit, ⁴⁵⁸ and this option and discretion expressed in the deed cannot be contradicted and denied by parol proof.

If the deed intended to, and by its terms does, confer upon Mrs. Mee an option and discretion to dispose of the land free from the trust, then, even if there should be a subsequent clause expressly raising the trust, the discretionary provisions would be superior, and the trust provisions would be subordinate.

In this connection it is proper to remark that the court of chancery appeals does not find that anything was said to the

draftsman of the deed, or anyone there, at the time of the execution of the deed, expressing a desire to impress a trust upon the property, but the evidence which was considered by the court of chancery appeals consisted of conversations and statements made by and between Mr. and Mrs. Mee previous to the execution of the deed, and Mrs. Mee's subsequent statement. That court, after reporting upon the evidence, says: "The real, difficult question in the case is whether or not Colonel Mee conveyed this lower farm to his wife, leaving it to her discretion and judgment as to whether or not she would convey it to complainants. It is manifest from the proof, however, that after the death of her husband she expressly said to complainants and others that she intended to convey it to complainants, and to convey it to them in obedience to the known wish of her husband. We think, therefore, that she held this land in trust for complainants."

It thus appears that the court of chancery appeals did ⁴⁵⁹ not find definitely whether the parol proof showed that the conveyance and disposition of the land was left to the discretion and judgment of Mrs. Mee, but that court seems to hold that defendant having, after the death of her husband, expressed her intention to convey to complainants in accordance with the husband's wish, constituted herself an express trustee for complainants' benefit.

But we do not think this follows by any means, but the action of Mrs. Mee is wholly consistent with the view that she was exercising her own discretion as to making such conveyance.

She may at one time, even after her husband's death, have intended to make the conveyance as her husband had desired; but it is clear she did not execute that intention when requested to do so, but withheld the execution of the deed, and kept it in abeyance, although under the trust as attempted to be set up, she was obligated to make such conveyance at once upon the death of the husband. Her action in declining at that time to make the conveyance negatives, instead of supports, the mandatory character of the trust, as sought to be set up, and at the same time is entirely consistent with the construction and language of the instrument, that she was to sell, convey or dispose of it as she might see fit, and for such purpose as she might deem best. A mere expression of intention would not, in the absence of execution, create the trust, nor make it any more binding. The only case in our books militating against ⁴⁶⁰ the view we have taken is that of *McLellan v. McLean*, 2 Head,

684. In that case there was a will by which property was given to Isabella Caroline McLellan and heirs, forever, "to dispose of as she may think proper," and in that case, and under that language, a trust was set up by parol.

The opinion in the case was delivered by a special judge, and the question involved in this case was not passed upon, and, so far as we can see, not presented to the court in that case. In the present case it is argued that the words in the deed of Mr. Mee authorizing and empowering Mrs. Mee to sell, dispose of and convey any or all of said property by sale or by will, or otherwise as she may see fit to do, and for such purposes as she may deem best, does not confer any greater estate nor give any more power to Mrs. Mee than would a deed in fee simple, upon which it is conceded a trust may be imposed. This we grant, but the question is not one of power to make the conveyance. That exists in the one case as well as in the other. But in the fee simple deed there is no conferring of discretion by the terms of the instrument. This discretion is added to the deed in controversy, and the parol proof seeks to vary and contradict these provisions which confer the discretion.

If there were no language in the deed giving the discretion, then the setting up of the trust would not be contrary to the language of the deed.

The principle upon which, in such case, parol evidence is admissible, is the supposed incompleteness of ⁴⁶¹ the instrument, and the parol evidence is competent to complete it, but not to contradict it.

It is laid down that the courts, following the analogy of uses, never permit the averment of a trust in contradiction to any expression of intention on the face of the instrument itself: Lewis on Trusts, sec. 51.

Again, "parol evidence is admissible to show the purpose for which an instrument was executed, and that its design and object were different from what its language, if alone considered, would indicate." But the rule is subject to the qualification that the purpose thus declared by parol must not be inconsistent with the express terms of the instrument, for, if the parties have clearly stated their purpose in the instrument itself, no extrinsic evidence will be received to contradict it: 21 Am. & Eng. Ency. of Law, 2d ed., pp. 1111, 1113.

It is difficult to understand, if Mr. Mee did not intend his wife to have this discretion and power, why he did not himself make the deed directly to his nephews. Why place the title in

her at all, if she must in any event and immediately pass it on to the complainants?

We do not stop to inquire what the object of Mr. Mee was in giving this power or discretion to his wife, nor why she has seen proper to exercise it. The crucial question before us is, Does the deed give the discretion in express terms in writing? If so, it cannot be taken away by parol evidence, because the effect of such evidence must inevitably be to defeat a discretion conferred ⁴⁶² in writing, and thus to alter, contradict and nullify the writing.

The view which we have taken is not only based upon sound reason, but also upon authority: *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227; *Thompson v. Thompson* (Tenn. Ch. App.), 54 S. W. 145; 1 *Lewis on Trusts*, sec. 51; 21 *Am. & Eng. Ency. of Law*, 2d ed., pp. 1111, 1113; *Thomas v. Scutt*, 127 N. Y. 133, 140, 27 N. E. 961, and cases cited in notes; *Hutchins v. Hebbard*, 34 N. Y. 24, and notes; *Chapin v. Dobson*, 78 N. Y. 74, 34 *Am. Rep.* 512, and notes; *Hall v. Livingston*, 3 Del. Ch. 373.

In the latter case the distinction here attempted to be set out is plainly stated as follows: "The effort of complainant is not to contradict or to impair the legal operation of the deed to Livingston, but rather to charge him, as the legal owner under the deed, with a trust arising out of an agreement dehors the deed touching its object and the uses of the estate conveyed."

There is a well-recognized distinction between contradicting a deed or impairing its legal operation and the arising out of the transaction of an equity dehors the deed binding the grantee's conscience to hold the land for the real purposes of the conveyance, and not according to its legal operation, when the latter use of it would, under the circumstances, work fraud. Such an equity is held to be independent of the deed, not excluded by it, as a mere conveyance of the legal estate, unless there be in it some terms or implication to that ⁴⁶³ effect. To support such an equity, parol evidence is admissible, not as contradicting the deed, but as explanatory of the transactions out of which the equity arises. In such case no allegation is necessary that a declaration of the equity or trust was, through fraud or mistake, omitted in the deed, because, as the equity or trust arises out of the extrinsic circumstances, and is not at all dependent upon the face of the deed, it needs not, in order to effectuate it, that the deed be reformed, or, which is the same thing, treated as if reformed.

The only real question in the case, as we view it, is whether the setting up of the trust as is asked for will contradict the terms of the deed; and we are of opinion that such trust, if declared to be mandatory, and not a matter of discretion on the part of Mrs. Mee, will be a direct contradiction, and the two cannot consist together. The decree of the court of chancery appeals is reversed, and the bill is dismissed, at complainants' costs.

Parol Evidence is Admissible, it is said in *Harris v. Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812, to show that a conveyance absolute on its face was made upon trusts. But other authorities hold that when a conveyance is absolute in form, the grantor is not permitted to prove by parol evidence that it was made in trust for himself and others: *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, and see the cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT OF APPEALS
[OF]
VIRGINIA.

LANE BROTHERS & COMPANY v. BAUSERMAN.

[103 Va. 146, 48 S. E. 857.]

PROCESS—Motion to Quash—Waiver.—If a motion to quash a summons is based upon a ground which is in bar of the action, such motion is waiver of all defects in the summons and in the return thereon. (p. 873.)

PROCESS—Motion to Quash—Waiver of Defects.—If process is illegally issued or executed, the validity of the process or return can be raised by a motion to quash, or by a plea in abatement, but if such motion is not made and disposed of before appearing to the action, or before taking or consenting to a continuance, the party waives all defects in the process and the service thereof. (p. 874.)

PROCESS—Motion to Quash—Statute of Limitations.—Even if the action has been barred by limitation, that question cannot be raised by a motion to quash the process. (p. 874.)

APPELLATE PRACTICE.—If Grounds of Demurrer in an action at law have been stated in writing as required by statute, but are not copied into the record, the appellate court must treat the case as if there had been no demurrer. (p. 874.)

MASTER AND SERVANT—Vice-principals—Safe Place.—Ordinarily the foreman or boss of a gang of men, engaged in executing the master's orders, is a mere fellow-servant with the other members of the gang, but if such foreman is discharging a non-assignable duty of the master, he is to that extent a vice-principal, and one of such duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. (p. 876.)

MASTER AND SERVANT—Vice-principals—Safe Place.—If the place where the servant has been engaged in work was originally safe, but has become unsafe during his absence and he is ignorant thereof, and cannot discover the fact by ordinary care, it is the duty of the master to inform him, and in his absence this duty devolves upon the foreman of a gang, acting for him as a vice-principal, and the statements of such foreman, made in the presence of the servant, as to the condition of the premises, are admissible as evidence in an action by the servant for injury received from such unsafe condition of the premises. (p. 876.)

MASTER AND SERVANT—Vice-principals—Negligence.—

Evidence of the refusal of employes to work on premises considered by them dangerous, of which fact they informed their vice-principal, and of the absence of any placard or other signal to show that the premises were dangerous, is admissible as tending to show the vice-principal's knowledge of the dangerous condition of the premises, and to rebut the idea of contributory negligence on the part of a servant injured while working under orders on such premises. (p. 878.)

EVIDENCE—Experts—Qualifications.—The question of the qualification of a witness to act as an expert is largely in the discretion of the trial court, and its ruling cannot be disturbed unless an abuse of discretion is clearly shown. (p. 878.)

EVIDENCE—Leading Questions.—As a general rule, the asking of leading questions cannot be assigned as error because the circumstances under which they may be asked is in the discretion of the trial court. (878.)

MASTER AND SERVANT—Negligence—Evidence.—If a servant seeks to recover for injury alleged to have been received by being placed in an unsafe place to work, the master has a right to show that such place was safe originally, but afterward was rendered unsafe by the servant's own acts. (p. 879.)

TRIAL—Instructions.—A correct instruction given by the court, but not previously given to the jury, may be read to it by plaintiff's counsel during the closing argument over the objection of defendant's counsel. (p. 880.)

M. L. Walton and Downing & Richards, for the plaintiffs in error.

R. T. Barton and Tavenner & Bauserman, for the defendant in error.

148 BUCHANAN, J. John W. Bauserman instituted his action of trespass on the case against John E. Lane and others, doing business as partners under the firm name of Lane Brothers & Co., to recover damages for personal injuries suffered by him while working in the defendants' rock quarry, and alleged to have been caused by their negligence.

149 Upon the calling of the cause, the defendants appeared and moved the court to quash the writ or summons. This motion was overruled and the defendants excepted. This action of the court is assigned as error.

The bill of exception states that the grounds of the motion were, because the summons and return thereon were not in accordance with law, and that more than one year had elapsed between the time the plaintiff was injured and the institution of the action. One of the grounds of the motion to quash was in bar of the action, being in effect a plea of the statute of limitations, and was therefore a waiver of all defects in the process and return thereon.

It is well settled that if process be illegally issued or executed, the validity of such process or return can be raised by a motion to quash, as well as by a plea in abatement: See *Garrard v. Henry*, 6 Rand. 112, 116; *Pulliam v. Aler*, 15 Gratt. 54, 62; *Warren v. Saunders*, 27 Gratt. 259, 268; *Raub v. Otterback*, 89 Va. 645, 648, 649, 16 S. E. 933; *Norfolk etc. Ry. Co. v. Carter*, 91 Va. 587, 22 S. E. 517; 1 *Robinson's Practice*, old ed., 162; 4 *Minor's Institutes*, 1st ed., 532. But if such motion be not made and disposed of before appearing to the action, or before taking or consenting to a continuance, the party is held to have waived all defects in the process and service thereof: *Wynn v. Wyatt*, 11 Leigh, 584, 590, 595; *Pulliam v. Aler*, 15 Gratt. 54; *Harvey v. Skipwith*, 16 Gratt. 410, 414; *Petty v. Frick*, 86 Va. 501, 503, 10 S. E. 886; *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

Even if the action had been barred by the statute of limitations, that question could not be raised by a motion to quash the process. The motion to quash was, therefore properly overruled.

The defendants demurred to the declaration and each count thereof. The demurrer was overruled, and this action of the court is assigned as error.

¹⁵⁰ The grounds of the demurrer were set forth in writing and filed, as required by counsel and the court, but that paper is not copied into the record, and it does not appear what the grounds of demurrer were.

Section 3271 of the Code, as amended by an act of assembly, approved January 22, 1900 (Acts 1899-1900, p. 111), provides, among other things, "that all demurrers shall be in writing, except in criminal cases, and in civil cases the court, on motion of any party thereto, shall, or of its own motion may, require the grounds of demurrer relied on to be stated specifically in the demurrer, and no grounds shall be considered other than those so stated; but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial."

Since the trial court could not consider any ground of demurrer other than those stated specifically, and as they are not copied into the record, this court will treat the case as if there had been no demurrer; otherwise, it might reverse the trial court upon a ground of demurrer not stated specifically before the trial court, and which that court had no right to consider under section 3271 of the Code, as amended.

It may not be amiss to say that the amendment to section 3271 is an eminently wise one, and if taken advantage of by the trial courts will do away with the practice of assigning one ground of demurrer in the trial court and relying upon a wholly different ground in the appellate court—a practice which frequently results in the reversal of trial courts upon questions never presented to or considered by them.

Upon the trial of the cause, Bott, one of the plaintiff's witnesses was asked, "Just state how the accident occurred," and answered, "I says to Mr. Fisher 'Joe, has that hole gone off?' and Mr. Fisher says, 'Yes, sir,' and walked up to the hole and pulled the wire out." The defendant objected to ¹⁵¹ both question and answer. The court overruled the objection, and this action of the court is assigned as error.

Bott was an eye-witness to the accident, and there was no valid objection to asking him how it occurred. The objection made to the answer is that Fisher's assurances of safety, or his declarations, were not binding on the defendants. Fisher was the foreman in charge of the men known as the "steel gang." His duties were to work along with his men, and to look after them, and when the superintendent was not there (and he was not at the time of the accident) to direct them. In order to understand the objection made to Fisher's answer, it will be necessary to state briefly some of the facts of the case, which the evidence tended to prove.

The defendants' rock quarry was located on a very steep hillside, where the stones lay in ledges of different depths, and were gotten out for dimension or building purposes exclusively. The manner of getting them out was by drilling holes with steam or hand drills, to put a small load or charge of powder in each hole, tamp clay upon the powder, connect a wire with an exploder attached pressed down to the powder, then attach the wires, positive and negative, so as to make a complete circuit to an electric battery, by which the blasts were set off. The effect of which was to spring the stone and open fissures between the layers. Sometimes, when it was desired to remove more than one layer of stone, an additional charge of powder was placed in the hole corresponding to the layers and prepared for explosion by the electric battery in the same manner as above described. Eight or ten days before the accident, some twenty or more holes had been drilled, all about eight feet deep, and loaded. Three of these holes near together had been loaded with two charges in each. When the electricity was

applied, the loads in the other holes and five of the six loads in the three holes exploded, leaving one unexploded in the middle hole. ¹⁵² The three holes were again loaded one charge in the middle hole and two in each of the others, and the electricity applied, but the bottom load in the middle hole again failed to explode. For eight or nine days water was poured into that hole to wet the powder, and during that time it rained on the hole. The water disappeared. After waiting this period for the water to do away with the danger of the powder exploding, Fisher, the foreman, who had charge of this work, directed three members of the steel gang, the plaintiff being one of them, to clean out the middle hole. While engaged in drilling out the tamping in that hole with a hand churn drill, the undischarged load or charge of powder exploded, injuring the plaintiff and the other two employes engaged in unloading the hole. The plaintiff, who had been working in the quarry most of the time since the August before, testified that until two or three days before the accident he had been absent for a week or more, working his crops at home, was not present when the hole was loaded, knew nothing of the history of that blast, nor the condition of the hole when he was directed to aid in cleaning it out; that after he was so directed he saw Fisher pull a wire out of the hole and heard Bott ask him "if it was all right, and he said, 'Yes, sir; go ahead,' or something to that effect," and that they then commenced to drill out the hole with a churn drill, using water and getting the dirt out with a swab, and while so engaged the accident occurred.

Ordinarily, where the work directed to be done by the master or his representative is intrusted to a gang or group of hands, and one of them is selected as foreman or boss to see to the execution of the work, such foreman or boss is a mere fellow-servant with the other members of the gang: *Richmond Locomotive Works v. Ford*, 94 Va. 627, 642, 643, 27 S. E. 509; *Russell etc. Coal Co. v. Wells*, 96 Va. 416, 422, 31 S. E. 614. But if his work relates to duties which are not assignable by the master, ¹⁵³ then to that extent he may be a vice-principal. One of the nonassignable duties of the master is to exercise ordinary care to furnish a reasonably safe place in which his employes are to work.

In this case there is no claim that the quarry in which the plaintiff had been working up to some ten days before the accident was not in a reasonably safe condition, considering the dangerous character of the work; but it is insisted that between

the time the plaintiff had quit work and gone home, and the time of his return, the place at which he was directed to work, and was working when injured, had been rendered unsafe by what had been done during his absence, which dangerous condition he did not know, and could not have discovered by ordinary care. If this state of facts existed, and there was evidence tending to show that it did, it was the duty of the defendants to inform the plaintiff of the condition of the hole so far as they knew it when he was put to work on it. And as neither the defendants nor their superintendent were present, and Fisher was directing the work, he must be regarded as the representative of the defendants, in seeing that the plaintiff, if he was really ignorant of the danger, without fault on his part, was informed of the condition of the hole so far as the defendants knew or in the exercise of ordinary care ought to have known it. This being so, the statement of Fisher in the presence of the plaintiff, as to the condition of the hole, was admissible in evidence.

Assignments of error based upon bills of exception numbered 3, 4 and 5 may be considered together. The answers of certain witnesses were permitted to go to the jury over the defendant's objection, for the purpose of showing Fisher's knowledge of the dangerous condition of the hole, when he directed the plaintiff with others to clean it out, and for that purpose only. The answers in question showed that the witnesses refused ¹⁵⁴ to work at the hole when Fisher directed them to do so, because they regarded it as dangerous, and so informed Fisher. The evidence objected to tended to show that Fisher had knowledge of the condition of the hole when he directed it to be cleaned, and so limited was properly admitted.

The plaintiff, when examined as a witness was asked over the defendants' objection, "What was the appearance of the hole and rock when you were sent up there to work at it?" To which inquiry he replied, "I saw Mr. Fisher pull out a wire and I heard Mr. Bott ask him if it was all right, and he said yes, or something to that effect." The action of the court in permitting that answer to go to the jury is assigned as error.

The evidence was admissible for the reasons stated in disposing of the assignment of error based upon the second bill of exceptions.

Jenkins, one of the plaintiff's witnesses, was asked, "Was there any device of any sort, any placard or anything stuck in the hole, to show that it was loaded?" To which inquiry he

answered, "No, sir." This evidence was admissible, if not to show negligence on the part of the defendant in failing to give warning of the condition of the hole, at least to rebut the idea that the plaintiff was guilty of contributory negligence in working at the hole in the face of such a danger signal.

The assignments of error based upon bills of exception numbered 8 and 9, may be considered together, as they both relate to the action of the court in permitting certain witnesses to testify as experts. The objection made to their evidence is that it was not shown that they had such knowledge as entitled them to testify as experts upon the subject upon which they were examined.

It appeared that the witnesses in question had been engaged in stone quarries, drilling holes and blasting, for many years—one for sixteen or seventeen years, and the other for twelve or ¹⁵⁵ fifteen years, and that they had considerable experience in unloading unexploded blasts, and knew the proper method of doing that work, though neither claimed to know what was the method in general use. The question of their qualification to speak as experts was largely in the discretion of the trial court, and it will not be reversed for allowing witnesses to testify as experts, unless it clearly appears, as it does not in this case, that they were not qualified: *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

The case cited above is relied on by the defendants to sustain their contention, but in that case the trial court permitted the plaintiff to prove, not as in this case, the proper manner of doing the work in question, but how the work was done in a particular shop.

One of the plaintiff's witnesses was asked, "Is it safe and proper for a man to drill out a hole who does not know that a load was in it?" To which he answered, "No." This question and answer were objected to upon the ground that the question was leading and that it sought the opinion of the witness upon a subject upon which expert evidence was not competent.

The question is leading, but as a general rule such questions cannot be assigned as error, since the circumstances under which they may be asked is in the discretion of the trial court: *Richmond etc. Elec. Ry. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834, 837. The question did seek the opinion of the witness upon a matter upon which expert evidence was not admissible, and was therefore improper; but no injury could have resulted to the defendants from the answer since it is a matter of com-

mon knowledge that it is not safe for any one to drill out a hole loaded with powder when ignorant of the fact that it so loaded.

The assignments of error based upon bills of exception, numbered 11 and 12, are to the refusal of the court to permit the ¹⁵⁶superintendent of defendants' quarry to answer the following questions: "Did you assign to the steel gang any but experienced men?" and "What was your rule in selecting men for that steel gang?" The court properly refused to allow the last question to be answered.

The first count in the declaration charges that plaintiff's injuries were caused by reason of the carelessness, negligence, incompetency and want of skill on the part of the defendants, their agents and employes, who had charge of the quarry and works of the defendant. The second count charges that Fisher, the boss and foreman of the steel gang, was "without ordinary competency, care, prudence and skill in and for the performance of the duty required of him," etc. The defendants had the right to introduce evidence to meet these charges, and the answer to the first question which the bills of exception state the witness would have made would have tended to show that none but experienced men were selected for the steel gang. The court erred, we think, in not permitting that question to be answered.

The question raised by the thirteenth bill of exception was the correctness of the court's action in refusing to permit the superintendent of defendants' quarry to answer the following question, to wit: "Tell us what was the condition of the quarry on the day of the accident." The bill of exception states that it was intended to prove by him that the place assigned the plaintiff was a safe place when he was first assigned there, and that he made it unsafe by his own actions and conduct. This was relevant evidence and ought to have been admitted.

The plaintiff asked for six instructions to the jury, and the defendants for thirteen. The court gave all of plaintiff's instructions, ten of the defendants,' as asked, one as modified by the court, and refused to give the other two. The action of the court in giving the plaintiff's instructions, in modifying one and ¹⁵⁷in refusing to give two of the defendants' instructions, is assigned as error.

Without attempting any discussion of the many objections made to the court's action, it is sufficient to say that after a careful consideration we think the jury were fully instructed

upon the questions they had to pass upon, and that we see no error in the court's action in giving, modifying or refusing instructions to the prejudice of the defendants.

After the court had instructed the jury as above stated, and during the opening argument of the defendants' counsel, a controversy arose between counsel as to the burden of proof of contributory negligence. Thereupon the plaintiff's counsel tendered an instruction on that subject, which the court modified and gave, but did not read it to the jury, as the court thought all the counsel knew the instruction had been given. The instruction was read to the jury in the closing argument of plaintiff's counsel, to which the defendants objected, but the court overruled the objection; and this action of the court is assigned as error.

There is no pretense that the instruction, as modified and given, was erroneous. The plaintiff's counsel had the right to read it in his closing argument. If the defendants' counsel had been misled by what had occurred in reference to the instruction, their remedy was to ask the court to allow them to be further heard upon that subject, and not by objecting to what plaintiff's counsel plainly had the right to do.

The remaining assignment of error is to the refusal of the court to set aside the verdict, because contrary to the law and the evidence, and grant a new trial.

As the judgment of the court will have to be reversed for the errors above indicated and a new trial granted, it is unnecessary to consider that assignment of error.

An Employer is not answerable for an injury to one employé occasioned by the negligence of a coemployé (Kelly Island Lime etc. Co. v. Pachuta, 69 Ohio St. 462, 100 Am. St. Rep. 706; Indianapolis etc. Transit Co. v. Foreman, 162 Ind. 85, 102 Am. St. Rep. 185), except when his acts relate to personal duties due to the employés from the master: Enright v. Oliver, 69 N. J. L. 357, 101 Am. St. Rep. 710; Madigan v. Oceanic Steam Nav. Co., 178 N. Y. 242, 102 Am. St. Rep. 495; Rogers v. Cleveland etc. Ry. Co., 211 Ill. 126, 103 Am. St. Rep. 185; Baier v. Selke, 211 Ill. 512, 103 Am. St. Rep. 208. As to whether the foreman of men engaged in blasting is a fellow-servant with them, see Kelly Island Lime etc. Co. v. Pachuta, 69 Ohio St. 462, 100 Am. St. Rep. 706, and cases cited in the cross-reference note thereto; monographic note to Mast v. Kern, 75 Am. St. Rep. 587-589. The duty of mine owners to prevent injury to their employés is discussed in the monographic note to Wellston Coal Co. v. Smith, 87 Am. St. Rep. 557-595. And the liability generally of employers to employés who accept hazardous duties, is discussed in the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884-900.

CUMMINS v. BEAVERS.

[103 Va. 230, 48 S. E. 891.]

OPTIONS—Fraud.—The mere fact that an option to purchase land is taken for the purpose of speculation does not constitute fraud or unfair dealing. (pp. 884, 885.)

OPTIONS—Specific Performance of an option for the sale of land may be enforced in equity against the person signing it, although it is not signed by the other party. (p. 885.)

OPTIONS—Consideration—Revocation.—An option to purchase land given without consideration may be withdrawn at any time before acceptance upon giving notice to the other party thereto, but an option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired, and if such consideration is not paid at the date of the option, but at a later date and during the life of the contract, it may be specifically enforced. (p. 886.)

CONTRACTS—Parol Extension—Consideration.—The time for the performance of a written contract may be extended by parol, provided such extension is supported by some new and sufficient consideration. (p. 887.)

OPTIONS—Revocation—Consideration.—A written option to purchase land extended by parol without any new consideration may be revoked at any time before acceptance. (p. 888.)

VENDOR AND PURCHASER—Notice of Agreement to Sell. A person who takes a conveyance of the legal title to land, with knowledge that his grantor has agreed to sell it to another, holds it subject to the equitable estate already vested in such intending purchaser. (p. 889.)

Henry & Graham, for the appellants.

H. C. Alderson and Chapman & Gillespie, for the appellees.

231 CARDWELL, J. In May, 1901, E. Barnett and wife executed to Stephen Effler a contract known as an option, by which they gave to Effler or his assigns the exclusive right, until the tenth day of November, 1901, to purchase a certain tract of land therein described as lying in McDowell county, West Virginia, at the price of twenty-two dollars and fifty cents per acre. The option was, on the thirteenth day of August, 1901, assigned by Effler, for a valuable consideration, to A. Cummins.

On the third day of September, 1901, during the existence of the Effler option, then held by Cummins, Barnett and wife executed to one James M. Beavers an option contract on the same tract of land, by which they gave to Beavers the exclusive right to purchase the land at any time within forty-five days from the eleventh day of November, 1901, at the same price per

acre named in the Effler option, provided the land was not taken under the Effler option. This contract to Beavers, under seal, purports to have been executed for the consideration of one ²³² dollar, which was not paid, however, on the day of the execution of the contract, but was paid by Beavers on the thirteenth day of November, 1901, at which time the contract was acknowledged by Barnett and wife before a notary public.

Up to the eleventh day of November, 1901, Cummins had failed to exercise the Effler option, and on that day Barnett went to Cummins' place of business in the town of Tazewell, and called his attention to the fact that the Effler option had expired the day before (which was Sunday), and asked Cummins if he was going to take the land, at the same time offering him data by which the deed, as Barnett thought, might be prepared, and upon Cummins positively stating that he would not take the land at the price named in the option, as he considered the price too high, Barnett asked for the Effler option, which Cummins refused to surrender. After some discussion of the matter, Cummins said he would like to have two weeks to investigate the land; that he hadn't had time to do so, and that if Barnett would give him two weeks, if he did not take the land on that day two weeks, he would give up the contract he held. To this Barnett replied, "I will be back this day two weeks," having previously said to Cummins that he could not get the land for less than the price named.

On the 13th of November, 1901, two days after the conversation between Barnett and Cummins at the office of the latter, Barnett and wife acknowledged the Beavers option before a notary public, as above stated, and thereupon Barnett signed and delivered to Beavers a written notice to Cummins, as follows: "You are hereby notified that I have made arrangements for the sale of my land, so you will please deliver to Mr. James Beavers the John Effler option which expired on November 10, 1901, and which you still hold."

This notice was delivered to Cummins on the thirteenth day of ²³³ November, 1901, by Beavers, who then also notified Cummins of his option contract; that it took effect on the eleventh day of November, 1901, and that he had sent the contract to the clerk of the county court for recordation. Cummins again refused to surrender the Effler option, and refused to permit Beavers to see and examine it, and three days thereafter, to wit, on the sixteenth day of November, 1901, gave Barnett notice that he had elected to purchase the land under the Effler op-

tion, upon the terms therein stated. This notice from Cummins was delivered to Barnett on the 19th or 20th of November, and on the 23d of November, before Cummins had received a deed from Barnett and wife, or had incurred any expense in furtherance of a purpose to take the land, Beavers addressed a letter to Cummins and again notified him of his contract.

On the 20th of December following, Cummins instituted a chancery suit in the circuit court of Tazewell county against Barnett and wife, Effler, and Beavers, seeking to obtain title to the land in question, alleging that there had been a parol extension of the Effler option, and that since he had given Barnett notice that he would take the land referred to, he had been informed that Beavers had persuaded Barnett to give him an option on the land, and praying that Beavers be enjoined from any further attempt to carry out his contract. This bill was dismissed by Cummins before there was any appearance by the defendants.

On the twenty-fifth day of December, 1901, Beavers gave Barnett and wife verbal notice that he would take their land under his option, and on the day following, which was within forty-five days from November 11th next preceding, he gave them written notice of such election; that he was ready to comply with his contract, and made them a legal tender of the cash payment in accordance with the terms of the contract, which Barnett declined to receive.

²³⁴ On the thirtieth day of December, 1901, Barnett and wife, at the instance of Cummins, conveyed the land in question to the Faraday Coal and Coke Company, having at that time or previously obtained from Cummins a contract binding himself to bear all costs and expenses of any suit brought to vacate that deed, and giving Barnett the right to refund, without interest, the purchase money for the land which the grantee then paid, in the event the deed should be set aside.

At the February rules, 1902, this suit was instituted by Beavers against Barnett and wife, Cummins, and the Faraday Coal and Coke Company, for the specific execution of his contract with Barnett and wife, and to vacate the deed to the Faraday Coal and Coke Company, and to compel the defendants to convey title to the land to him, alleging a continued readiness to perform the contract fully on his part. Cummins and the Faraday Coal and Coke Company answered the bill, denying the right of the complainant to specific performance, on the ground that the contract sought to be enforced was unilateral

and could not be enforced for want of mutuality, and that there had been a parol extension of the Effler option, within which extension Cummins had accepted the terms of the option.

Upon the hearing of the cause on the pleadings, the exhibit therewith and depositions taken on behalf of the parties, the circuit court, by its decree, granted the relief prayed for in the bill, and from this decree Cummins and the Faraday Coal and Coke Company obtained an appeal to this court.

It will be observed from the foregoing state of facts that Cummins had a unilateral contract, or option, which, by its terms, expired on the 10th of November, 1901 and the appellee, Beavers, had a similar contract, running forty-five days from the 11th of November, 1901. The first contention of appellants is that appellee's contract, being a unilateral one, and without a consideration to support it, cannot be enforced in a court of equity for want of mutuality.

²³⁵ Appellee's contract expressly states a consideration of one dollar, and whether the one dollar was paid at the time the contract was signed by Barnett and wife or not, it was in fact paid when they acknowledged the contract for recordation on November 13, 1901, and, therefore, if the contract under which the appellants claim in fact expired on the eleventh day of November (the 10th being Sunday), it can make no difference whether the consideration stated in appellee's contract was paid on the 13th of November or prior.

There is some evidence that appellee's option was not taken in good faith, but was intended as a "sham" to force Cummins to take the land, and that appellee agreed verbally on November 13th to pay the Barnetts a four thousand dollar cash payment on the day of acceptance, instead of five hundred dollars, as provided by the terms of the option, and for that reason it should not be enforced in a court of equity; but as the learned judge of the circuit court, in his written opinion made a part of the record, says, there is nothing in the pleadings directly raising such issues. Conceding, however, that these issues are made by the pleadings clearly evidence tending to show an oral agreement altering the terms of the written contract was inadmissible, and it was excepted to, and we do not find in the evidence support of the contention that there was a lack of good faith on the part of the appellee in the transaction between him and the Barnetts. The mere fact that his purpose in taking the contract was speculation—that is, for the purpose of making a profit out of the transaction—does not constitute fraud

or unfair dealing, as this is usually the purpose in purchasing property, and was doubtless the object had in view by the appellants.

That unilateral or option contracts may be enforced in a court of equity is settled by the decision of this court in *Central Land Co. v. Johnson*, 95 Va. 223, 28 S. E. 175, where the opinion by Judge Harrison says: "The first error assigned is ²³⁶ that the contract evidenced by this resolution is not mutual, that not being signed by appellee it could not be enforced against him, and therefore appellee should not be allowed to enforce it in a court of equity against appellant. There are unquestionably strong reasons that can, and have been, assigned in support of this proposition, but the doctrine in this country and in England is now firmly settled by an overwhelming weight of authority that specific performance will be decreed against the party who signed the contract, although the other party did not sign, and although there is no mutuality of remedies between the parties at the time the contract was made." And further the opinion says: "In Virginia, while there have been expressions indicating a tendency of the judicial mind to the view that the contract must be signed by both parties, as in *Hoover v. Calhoun*, 16 Gratt. 112, the question has remained an open one up to this time, with the exception of *Wood v. Dickey*, 90 Va. 160, 17 S. E. 818, which is now relied on to support the contention of appellant. In that case a rehearing was allowed, and, pending the rehearing, the case was settled and dismissed without a final decision. It cannot therefore be accepted as controlling authority in this case.

"Regarding the question, therefore, as still an open one in this state, the court is of opinion that it was not necessary for the contract under consideration to be signed by the appellee to entitle him to its specific performance in equity.

"It was sufficient that it was signed by appellant, the party to be charged thereby; that when appellee instituted his suit to enforce specific performance of the contract, he thereby in writing consented to it, and made the remedy as well as the obligation mutual."

The case of *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 17 S. E. 558, 21 L. R. A. 133, is relied on by appellants, but in that case it is expressly stated that the consideration named in ²³⁷ the option was never paid, and if there is anything in the opinion which supports appellants' contention, it is at variance with the latest expression of this court in *Central*

Land Co. v. Johnson, 95 Va. 223, 28 S. E. 175, and the latter must control. In point of fact, however, the cases are wholly unlike, and the latter case is directly in point in the consideration of the case in hand, and is in strict accordance with the great weight of authority found in text-books and the decided cases: 2 Minor's Institutes, 769; Peay v. Seigler, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885; Peevey v. Haughton, 72 Miss. 918, 48 Am. St. Rep. 592, 17 South. 378, 18 South. 357; Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 13 Pac. 1106; Yerkes v. Richards, 153 Pa. St. 646, 34 Am. St. Rep. 721, 26 Atl. 221; People's St. Ry. Co. v. Spencer, 156 Pa. St. 85, 36 Am. St. Rep. 22, 27 Atl. 113; Warvelle on Vendors, 2d ed., par. 125; Pomeroy on Contracts, 235; Litz v. Goosling, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127; Clark on Contracts, 168, 169; Watts v. Keller, 56 Fed. 1, 5 C. C. A. 394; Mathews' Slate Co. v. New Emp. S. Co. (C. C.), 122 Fed. 972; Black v. Maddox, 104 Ga. 157, 30 S. E. 723; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544; Weaver v. Burr, 31 W. Va. 743, 8 S. E. 743, 3 L. R. A. 94; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339; Guyer v. Warren, 175 Ill. 328, 51 N. E. 581.

The distinction between an option given without a consideration and an option given for a valuable consideration is that in the first case it is simply an offer to sell and can be withdrawn at any time before acceptance, upon notice to the vendee, but in the second, where a consideration is paid for the option, it cannot be withdrawn by the vendor before the expiration of the time specified in the option: *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 19, 24 Pac. 695.

Again, conceding that the consideration for appellee's option was not paid until November 13, 1901, we are nevertheless of opinion that the option was a valid contract, binding upon the ²³⁸ Barnetts for forty-five days from the 11th of November, and could not be withdrawn by the Barnetts before the expiration of the time specified, and gave the appellee priority of right to purchase the land in question over the right of Cummins under the Effler option, unless there was a valid extension of the latter's option for two weeks from the eleventh day of November, within which time Cummins notified Barnett of his purpose to take the land.

Appellant Cummins practically concedes that the Effler option, under which he claims, expired on the 11th of November, when he insists that by parol agreement with Barnett on that

day an extension of two weeks was given him, and that, he having accepted within that time, his equity is superior to appellee's equity under his option, to call for the legal title. The decision of this case, therefore, turns upon whether this alleged extension of the Effler option was valid under the statute of frauds.

Clearly, there was no valuable consideration paid for this extension. Up to that time Cummins had done nothing requiring any outlay of expenditure, indicating his purpose to take the Barnett land. As a general rule, the time for the performance of a written agreement may be extended by parol, and an extension of such written agreement may be shown when supported by some new and sufficient consideration: Browne on Statute of Frauds, par. 411 et seq.; Bishop on Contracts, par. 771; Fry on Specific Performance, par. 777.

But was there in fact any extension or attempted extension of the Effler option agreed on between Barnett and Cummins on the 11th of November? The evidence wholly fails to show that there was. On the contrary, it appears that Cummins on that day said to Barnett that he would not take the land at the price stated in the Effler option; whereupon Barnett informed him that he would not get it at a less price. Cummins then ~~289~~ merely said to Barnett that he would like to have two weeks within which to look over the land; that he hadn't had time to investigate it, and if Barnett would give him two weeks and he didn't take the land at the end of the two weeks, he would then give up the Effler option; to which Barnett relied, "I will come back this day two weeks," and left Cummins' office. If this can be considered as an extension of the Effler option for two weeks, it was but a parol extension, without a consideration, and clearly Barnett had the right to withdraw it at any time before its acceptance by Cummins. That it was withdrawn on the 13th day of November, two days thereafter, there is not the least doubt. On that day, as we have seen, Barnett notified Cummins in writing that he had made arrangements to sell his land, and directed him to surrender the Effler option to the bearer of this written notice, who was the appellee, Beavers; and was also at that time informed that Beavers was the man to whom Barnett had agreed to sell his land. So that, before Cummins took any step whatever toward accepting the terms of the Effler option, it had expired by its own terms, and before the parol extension which is contended for had been accepted by Cummins it was clearly and unmistakably withdrawn by

Barnett; and before he paid any part of the purchase money to Barnett for the land in question, he had both actual and constructive notice of the rights of the appellee under his option, supported by a valuable consideration paid the 13th of November, 1901. That Barnett had the right to withdraw from the agreement, had it been made, to give Cummins two weeks to investigate the land, and to say whether he would take it or not, does not admit of discussion. Cummins was in no way bound by the alleged parol agreement to take the land, nor could Barnett be held bound by it until its terms were accepted by Cummins, and therefore it was but a parol offer on the part of Barnett to sell Cummins the land within two weeks upon ²⁴⁰ the terms of the Effler option, and which, as we have said, he had the right to withdraw before Cummins agreed to take the land, to say nothing of the superior and exclusive right of appellee to take the land under his option.

Says this court, in *Cady v. Straus*, 97 Va. 707, 34 S. E. 617: "Mutuality of obligation is of the essence of a contract, and it is binding upon neither party until the point is reached where the minds of the parties to it accede to one and the same set of terms. That an offer may be withdrawn at any time before its acceptance is settled law, and is, we think, not disputed. Since an offer unaccepted creates no rights, and is not binding upon the party making it, it follows that it may be revoked at any time before acceptance": See, also, *Clark on Contracts*, p. 47, and authorities cited; *Gustin v. Union School Dist. etc.*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; note to *Harris v. Murphy*, 56 Am. St. Rep. 664; *Weaver v. Burr*, 31 W. Va. 743, 8 S. E. 743, 3 L. R. A. 94; *Coleman v. Applegarth etc.*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284.

The last-cited case is similar in many respects to the case at bar. There A agreed in writing, in consideration of five dollars, to give to C the option of purchasing for a given price a lot of ground in the city of Baltimore, on or before the 1st of November, 1886. Before the expiration of the time thus limited, A verbally agreed to extend the time of the exercise of the option by C to the 1st of December, 1886. About the 9th of November, 1886, A sold and conveyed the lot in question to B. Subsequently, but prior to the 1st of December, 1886, C tendered A the sum which had been agreed upon and demanded a deed to the lot, which was refused. On the bill filed by C against A and B, for a specific performance of the contract made by A with C, it was held that as there was no con-

sideration for the verbal promise or agreement to extend the time for the exercise of the option, such promise was a mere nudum pactum, and therefore not enforceable. After the 1st of ²⁴¹ November, 1886, the verbal agreement of A operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn, or otherwise ended by some act of his; but he was entirely at liberty at any time before acceptance to withdraw the offer; and the subsequent sale and transfer of the property to B had the effect of at once terminating the offer to C.

In the case at bar there is no ground for the contention made by appellants, that appellee's option was revoked by the alleged agreement with Cummins of the 11th of November, 1901. Such was not the purpose of Barnett, if the power to do so had been in him, as shown by his declaration made when told that Cummins had refused to give up the Effler option to appellee on November 13th, viz.: "Cummins will never get my land." The situation of Barnett, a plain unlettered farmer, was simply this: He was anxious to make sale of his McDowell county land to realize the means with which to pay for a home place purchased in Tazewell county, for which he was being pressed, and both appellee and Cummins were desirous of purchasing the McDowell county land. Cummins giving no assurance of his purpose to take the land, Barnett held on to his contract with appellee, and never sought to evade it till either intimidated by the suit brought by Cummins against him, or induced by the indemnity he obtained from Cummins into a conveyance of the land to the latter's appointee, the Faraday C. & C. Co. Cummins, by his dilatory tactics, has simply lost his right to purchase the land, and obtaining the conveyance thereof to his coappellant places him on no higher ground than he occupied before that conveyance. He had full notice of the right of appellee, and that appellee had a valid contract which he could enforce in a court of equity against Barnett and wife. Of this, as we have observed, he had both actual and constructive notice, and therefore taking the title to the land from Barnett ²⁴² with such knowledge, he took it subject to the contract of appellee.

"A person who takes conveyance of the legal title to land, with knowledge that his grantor has agreed to sell it to another person, takes it subject to the equitable estate already vested in the purchaser": *Brodhead v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

That appellee accepted the terms of the option given to him by Barnett and wife within the time specified, and tendered to them payment for the land, as the contract required, is clearly shown in the record, and it is also made to appear that he has at all times been ready and able to perform the contract on his part.

We are therefore of opinion that the decree complained of is right and should be affirmed.

The Requirements of the Statute of Frauds, in reference to contracts or options for the sale of land, may be satisfied by a writing signed by the vendor alone: *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, and cases cited in the cross-reference note thereto; *Broadhead v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735, and cases cited in the cross-reference note thereto. But it is held in *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, that a unilateral contract in writing, simply giving an option to purchase land within a specified time, for a given price, is binding only on the party who signs it, and upon him only for the time stipulated; and that a verbal agreement to extend the time for the exercise of an option, unsupported by a consideration, is not enforceable. See, too, *Atlee v. Bartholomew*, 69 Wis. 43, 5 Am. St. Rep. 103.

An Option to Buy Land, given for a good consideration, cannot be revoked during the time limited: *Tibbs v. Zircle*, 55 W. Va. 49, 104 Am. St. Rep. 977; *Mueller v. Nortmann*, 116 Wis. 468, 96 Am. St. Rep. 997, and cases cited in the cross-reference note thereto.

JOHNSON v. BLACK.

[103 Va. 477, 49 S. E. 633.]

EQUITY JURISDICTION—Multifariousness of Bill.—It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Each case must be decided upon its own circumstances. The criterion by which courts are governed is convenience in the administration of justice. If the bill reaches the desired end in a convenient way for all concerned, and the mode adopted is not so injurious to anyone as to render it unjust for the suit to be maintained in the form adopted, the bill will not be deemed to be multifarious. (pp. 894, 895.)

EQUITY JURISDICTION—Remedy of Taxpayers for Diversion of Public Funds.—Courts of equity have jurisdiction to restrain the illegal diversion of public funds at the suit of one or more citizens and taxpayers, when brought on behalf of himself or themselves and others similarly situated, and to compel the restitution of public funds illegally diverted and lodged in the hands of persons not entitled to them who have taken them with notice of the wrongful diversion, and the governing body of the subordinate or local government will not act or take the necessary steps to have such funds restored. (p. 895.)

EQUITY JURISDICTION.—Courts of equity having once acquired jurisdiction never lose it simply because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words. (pp. 895, 896.)

LACHES cannot be Imputed to one who is innocently ignorant of his rights. (p. 898.)

LACHES cannot be Imputed to Taxpayers who are ignorant of the fact that members of a board of supervisors have been misappropriating the public funds. They have a right to presume the contrary, although the books of the board of supervisors are open to inspection, because no duty of inspection rests upon such taxpayers. (pp. 898, 899.)

OFFICE AND OFFICERS—Compensation.—A person who accepts an office with a fixed salary is bound to perform the duties of the office for the salary and cannot legally claim additional compensation for the discharge of those duties, even though the salary be very inadequate. (p. 899.)

LIMITATION OF ACTIONS—Municipal Corporations.—The statute of limitations runs against counties or other political subdivisions of a state in the same manner and to the same extent as against natural persons. (p. 902.)

LIMITATION OF ACTIONS.—Boards of Supervisors are constructive or implied trustees of counties, and the statute of limitations runs in their favor as to an action brought against them to compel the restitution of public funds illegally diverted by them. (p. 902.)

J. W. Happer, M. R. Peterson and F. L. Crocker, for the appellants.

J. B. Jenkins and Green, Withers & Green for the appellees.

⁴⁷⁸ **HARRISON, J.** This suit in equity was brought by Foster Black and five others, resident citizens and taxpayers of the county of Norfolk, against the board of supervisors of that county, and the appellants, for the purpose of compelling the appellants to restore to the county treasury certain public moneys which it is ⁴⁷⁹ charged they had illegally and fraudulently withdrawn therefrom.

The bill alleges that the complainants had recently discovered that for eleven years said board had been continuously violating the law with respect to the compensation of its members, and had illegally and fraudulently, during that time, allowed and ordered to be paid out of the funds of the county, to the respective members of the board, compensation greatly in excess of that allowed by law. The names of the members of the boards during the time mentioned are set forth as defendants, and among them are the appellants.

There is filed with the bill, as a part thereof, a statement—exhibit “A”—taken from the records of the board, which shows

that, between June 10, 1890, and June 11, 1901, compensation aggregating \$16,192.75 had been allowed by the board to its several members; that of this sum the appellant, W. S. Johnson, who had been in office continuously during that time, had received the sum of \$3,042.75; that the appellant, John A. Codd, who had been in office from 1892 to 1901, had received the sum of \$3,893; that the appellant, George E. Wood, who had been in office from 1896 to 1901, had received the sum of \$1,932; that the appellant, J. C. Lynch, who had been in office from 1896 to 1901, had received the sum of \$849.50; and that the appellant, D. M. Harding, who went into office in 1901, had received the sum of \$62.77. This statement also shows the several sums received by the other nine persons, defendants in the court below, during the respective periods of their occupancy of the office, to have been, according to length of service, in somewhat corresponding proportion to those mentioned. The bill further alleges that under the law regulating the compensation of members of boards of supervisors, during the time mentioned, no member of such boards, for that time or for any part thereof, could have legally been paid as compensation for⁴⁸⁰ his services as much or anything like as much, for any one year, or for the whole of such time as the statement, exhibit "A," shows that the defendants received upon the order of the board of which they were respectively members. It is therefore further alleged that the payments so made to the defendants, and each and every one of them, as shown on said statement, were the result of an illegal, fraudulent and corrupt combination upon the part of the members of said respective boards of supervisors, to divert to the use of themselves, in their individual capacity, money belonging to the taxpayers of the county, which was controlled and held in trust by these several boards of supervisors as the representatives of the county for purposes authorized by law; that each of the defendants to whom such overpayments were made, as set forth, had notice of and participated and acquiesced in a fraudulent, illegal and corrupt breach of trust, and are liable in equity therefor, and can be treated therein, each of them, as trustee for the county and its taxpayers, for the amounts so overpaid, with interest on the same from the date of such payments, and can be required in this suit to repay the same into the treasury of the county.

It is further alleged that if the amount of such overpayments can be recovered for the county, it will materially lessen the taxes to be paid by complainants and the other citizens of the

county; that complainants had applied to the present board of supervisors of the county to take some steps to recover such illegal payments, but that it had refused to pay any attention to the application, and had treated the same with contempt, thus refusing complainants and the county any hope of relief from action on their part; that further application to said board in this behalf would be a useless waste of time as five out of its six members are parties defendant hereto whom complainants wish to compel to refund to the treasury of the county moneys illegally paid to them.

⁴⁸¹ The prayer of the bill is that an account may be taken of the amounts illegally paid to the defendants from the funds of Norfolk county; that a decree may be entered against each of the defendants for the amount so found to have been illegally paid, to be paid into the treasury of the county, and that each of the defendants be declared and held to be a trustee for the county to the extent of such illegal and fraudulent payments, and for general relief.

The defendants filed their several demurrers and separate answers to this bill, and the demurrers were overruled. In their answers they set out the amounts they have received for attendance on the meetings of the boards and for mileage in going to and returning therefrom, as well as the amounts which they have received for service on committees of the boards, and for other alleged beneficial services rendered the county. They declare that they have faithfully performed their duties as members of the boards upon which they served, and deny that there was any illegal or fraudulent combination among them to divert the funds of the county to their own use, or that they have been guilty of any breach of trust in relation thereto, and claim that under a proper construction of the law, and in view of the arduous duties they have had to perform in such a large and prosperous county as Norfolk, and the manifest benefit of such services to the county, the amounts sought to be recovered were legally and properly allowed and paid to them. They also say that all of their meetings were open to the citizens of the county, and all of their allowances matters of public record, and that the complainants knew, or might by due diligence have known, of the allowances to themselves at the time they were made. They also plead in their answers the bar of the statute of limitations. Numerous depositions were taken, and certified copies from the records of the boards of supervisors filed.

⁴⁸² The circuit court held that the evidence did not justify the charge that the defendants had entered into a fraudulent conspiracy, but only showed that they had followed an illegal custom and precedent of their predecessors in office, in illegally withdrawing from the treasury of the county compensation in excess of that allowed by law; that the defendants had illegally withdrawn from the county treasury compensation in excess of their lawful right, the amount of which excess in compensation the complainants were entitled to have returned to the treasury of Norfolk county, so far as the recovery of the same is not barred by the statute of limitations, being of opinion that the defense of the statute of limitations was good as to any defendant who had not drawn such illegal compensation within three years prior to the institution of this suit. The court, proceeding further, holds that a recovery is barred by the statute as to all of the defendants except W. S. Johnson, against whom a decree is entered for \$945.20, with interest on the several parts thereof from the date that each payment was received; John A. Codd, against whom a decree is entered for the sum of \$1,283.75, with like interest; George E. Wood, against whom a decree is entered for the sum of \$1,070, with like interest; J. C. Lynch, against the administrator of whom decree is entered for the sum of \$412, with like interest; and D. M. Harding, against whom decree is entered for the sum of \$36.30, with like interest. From this decree, which appoints a receiver to collect these several sums, the five defendants held liable have taken this appeal.

The first assignment of error is to the action of the court in not sustaining the demurrer to the bill.

It is insisted that the bill is multifarious, and should for this reason have been dismissed.

It has been repeatedly said by this court that it is impossible for courts to lay down any general rule as to what constitutes ⁴⁸³ multifariousness; that they are left to decide each case upon its own circumstances, governed only by a sound discretion. The criterion by which courts are guided in considering this question is "convenience in the administration of justice." Each case, if not brought directly within the principle of some preceding case, must be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties; the adequacy of the legal remedy, the situation of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; whether

within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any.

In the case of *School Board v. Farish*, 92 Va. 160, 23 S. E. 221, this court said: "Courts in dealing with this question look particularly to convenience in the administration of justice; and if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that when we look to see if a bill is multifarious, the first question to be determined is: Does the bill propose to reach the end aimed at in a convenient way for all concerned? And if the mode adopted does accomplish the end of convenience, then the question arises, Is anyone hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?" These views are reiterated with approval in the subsequent cases of *Spooner v. Hilbish*, 92 Va. 338, 23 S. E. 751, *Staude v. Keck*, 92 Va. 544, 24 S. E. 227, *Jordan v. Liggan*, 95 Va. 616, 29 S. E. 330, and *Dillard v. Dillard*, 97 Va. 436, 34 S. E. 60.

Considering the bill in the case at bar in the light of these ⁴⁸⁴ authorities, there is no difficulty in the conclusion that it is free from the vice of multifariousness. The plaintiffs were suing as the representatives of a class, the issues to be determined were common to all of the defendants, and they were in the same situation so far as the points to be contested were concerned, the same defenses being made by them in their several answers. They have had the opportunity, without the slightest embarrassment or difficulty, to make their defense in a suit in which no possible harm has been or could have been done them; and, lastly, they have been saved a heavy burden of costs to each defendant which would have been the result of a separate suit brought against each. In short, the ends of justice have been reached with the greatest possible convenience to all concerned, and without injury or even inconvenience to any party to the proceeding.

It is further contended that the demurrer should have been sustained and the bill dismissed because the appellees had an adequate remedy at law.

It has long been a well-established doctrine that courts of equity have jurisdiction to restrain the illegal diversion of pub-

lic funds at the suit of a citizen and taxpayer, when brought on behalf of himself and others similarly situated; and to compel the restitution of public funds which have been illegally diverted and lodged in the hands of persons not entitled to the same, who have taken them with notice of the wrongful diversion, and the governing body of the subordinate or local government will not act or take the necessary steps to have such funds restored: *Bull v. Read*, 13 Gratt. 78; *Redd v. Supervisors*, 31 Gratt. 695; *Roper v. McWhorter etc.*, 77 Va. 215; *Lynchburg etc. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 100; *Anderson v. Pratt*, 44 Cal. 309; *Bailey v. Strachan*, 77 Minn. 526, 80 N. W. 694; *Land Log etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. ⁴⁸⁵ W. 964; *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103, 63 L. R. A. 133; *In re Police Dept.*, 85 Minn. 302, 88 N. W. 977; *Shepard v. Easterling*, 61 Neb. 882, 86 N. W. 941.

But the appellants contend that notwithstanding the well-settled doctrine recognized by the authorities just cited, the appellees have an adequate remedy at law under section 836 of the Code of 1887, which, as amended, is carried into Virginia Code of 1904, section 836.

Courts of equity having once acquired jurisdiction never lose it because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words: *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235; *Kelly v. Lehigh etc. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511; *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227.

There is not a word or expression in the statute mentioned to indicate an intention to take away the jurisdiction that has been exercised for years by courts of equity in this class of cases. The section provides how accounts, to be allowed by the board of supervisors, shall be made out; that the county shall be represented by the commonwealth's attorney, and all improper accounts resisted by him, and when he thinks proper, or shall be required to do so by any six freeholders of the county, he shall appeal from any decision of the board to the circuit court of the county, causing a written notice of such appeal to be served on the clerk of the board, and on the party in whose favor the claim is allowed, within thirty days after the decision is made. It is thus seen that the right of appeal under this section, from the allowance of a claim by the board of supervisors, is limited to freeholders and to the concurrence of six

of their number, and its exercise is limited to thirty days from the decision of the board. It cannot be presumed that the legislature intended by this statute, without restrictive or prohibitory words, to take away the jurisdiction of courts of equity ⁴⁸⁶ to entertain any taxpayer suing on behalf of himself and others similarly situated for the purpose of preventing the unlawful diversion of public funds, or for the purpose of compelling the restoration of such funds when already diverted.

But it is contended that this question has been settled to the contrary, by this court, in the cases of *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. 481, and *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S. E. 438. The sole object of the first-mentioned case was to test the constitutionality of the Virginia election law approved March 6, 1894. To accomplish this certain citizens and taxpayers of Brunswick county filed a bill alleging that an election had been held under this law and certain expenses had been incurred thereby; that bills covering these expenses had been presented to and allowed by the board of supervisors of the county and warrants drawn on the county treasurer therefor. They further alleged that the law under which the election had been held was unconstitutional and void, and that the expenses accruing thereunder were therefore not legal charges against the county, and praying that the treasurer be enjoined from paying the same. This court held that the law in question was valid. Judge Keith, after concluding his elaborate and able opinion on the constitutional question, which was a complete decision of the case, added these words: "If, however, we had come to a different conclusion as to the constitutional question involved in the record which accompanies the petition in this case, we would still be obliged to refuse the appeal asked for, as the plaintiff had a plain and adequate remedy at law under section 836 of the Code of Virginia without resorting to a bill in chancery."

It may be that the remedy for the improper allowance of a claim for election expenses is by an appeal under section 836 from the decision of the board of supervisors; but it is apparent that the learned judge was not dealing with the question ⁴⁸⁷ now under consideration, nor was the language relied on necessary to the decision then made. It cannot, therefore, be regarded as militating against the view taken of the case before us.

The last-mentioned case of *Manly Mfg. Co. v. Broaddus*, 94 Va. 547, 27 S. E. 438, holds that a taxpayer cannot come into

a court of equity in a case where no fraud is charged, and where there is no pretense that the board of supervisors was transcending its power, merely to settle an account between a claimant and the board. The facts of the case are wholly different from those in the present case, and Judge Keith, in delivering the opinion of the court, says it is unnecessary to decide that the provision which requires the attorney to appeal at the instance of six "taxpayers" was intended to be in lieu of the right of taxpayers to resort to a court of equity, and we make no decision upon it. The opinion of the learned judge recognizes the right of taxpayers to come into a court of equity to protect their interests in a great variety of cases, and cites authorities in support of the proposition. These cases are not in conflict with the doctrine we have announced with reference to the jurisdiction of a court of equity in a case like the one before us, and we conclude what we have to say on this subject with the remark that whatever remedy section 836 may afford as against a claim allowed by the board of supervisors before the same has been paid, it certainly furnishes no remedy for the recovery of moneys illegally diverted from and already paid out of the public treasury which is the object of the present suit.

It is further assigned as ground in support of the demurrer that the appellees were guilty of laches.

The evidence shows that the appellees were not aware that the members of the board of supervisors had been drawing extra compensation until a few months before the institution of this suit, and it is well settled that laches cannot be imputed to those who are ignorant of their rights. It is no answer to ⁴⁸⁸ say that the books of the board were open to the public, and could have been examined at any time. No duty rested upon appellees to examine the records kept by the board of supervisors. They, in common with other taxpayers, had the right to presume that their chosen representatives and agents would faithfully discharge their public duties within the law that regulated and prescribed those duties, and that they would not illegally divert the public funds to their private use. The appellants represented the public, and they cannot escape liability upon the ground that their constituents did not discover sooner that they were unlawfully withdrawing the money of the taxpayers from the public treasury and appropriating the same to their individual use.

Further detail would extend this opinion, necessarily long, beyond reasonable limits. It must, therefore, suffice to say

that, considering all of the objections made to the scope and purpose of the bill, we are of opinion that the demurrers were properly overruled.

The only compensation provided by law for a supervisor is fixed by section 848 of the Code of 1887, which, as amended, is now found in Virginia Code (1904), section 848. It is there provided that each supervisor shall receive "three dollars per diem for the time he shall actually attend, and five cents for each mile traveled in going to or returning from the place of meeting; but no per diem allowance should be made for any time occupied in traveling where mileage is allowed therefor; provided that but one mileage shall be allowed for any one term of meeting of such board; and no supervisor shall be allowed to draw pay for more than ten days' attendance in any one year."

The record shows that during the period covered by this inquiry, the members of the board of supervisors of Norfolk county appropriated and received for their private individual ~~489~~ use thousands of dollars in excess of the per diem and mileage provided by the plain terms of the statute. The justification offered for this course is that the amount received was for attendance upon committees, and for other alleged beneficial services rendered by them to the county in their official capacity, and was no more than these services were reasonably worth, and that their action in this behalf was in accordance with the custom of their predecessors in office. This may not have been regarded by appellants as malfeasance, and it was doubtless not done with an evil intent, but it was none the less fraud in law upon the rights of the taxpayers of the county. Services rendered by public officers do not partake of the nature of contracts and have no affinity thereto. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right: *Loving v. Auditor*, 76 Va. 942; *Holladay v. Auditor*, 77 Va. 425; *Frazier v. Virginia Military Institute*, 81 Va. 59; *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907; *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. Rep. 890, 44 L. ed. 1187.

In *Dillon on Municipal Corporations*, volume 1, section 233, it is said: "It is a well-settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of those duties, even though the salary be a very inadequate remuneration for the services. Nor

does it alter the case that by subsequent statutes or ordinances his duties within the scope of the charter powers pertaining to the office are increased and not his salary. Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions to the duties properly belonging or which may properly be attached to an office to lay a foundation for extra compensation would soon introduce intolerable mischief. The rule, ⁴⁹⁰ too, should be very rigidly enforced. The statutes of the legislatures and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse."

To the same effect is Mechem on Public Officers. This author says that unless compensation is attached by law to an office none can be recorded. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth. In section 862 of this work it is said: "Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office. An express contract to pay such extra compensation or an express allowance of it is void."

These views are also found expressed in Throop on Public Officers and by other text-writers.

In a very able opinion in the case of *Delaplane v. Crenshaw*, 15 Gratt. 457, Judge Lee, in discussing this subject, says: "It is certainly a marked feature in our system of offices that the compensation of public functionaries shall be fixed and certain. It is a great and pervading principle of our code, and is essential to the purity and impartiality of the government. The idea of a perquisite of office, in the sense of a fee or allowance for services beyond the ordinary salary or settled wages, has no place in our legislation, but seems to be repudiated by the most necessary implication. Once to admit it is to open a wide door for imposition and corruption." Further the learned judge says: "He takes the office on the terms and conditions prescribed by the statute, and when it allows a fixed and definite ⁴⁹¹ fee for the service which he is to perform, I think it is very far-fetched and illogical to say that he acquires also, by virtue

of his appointment, a right as by contract to a portion of the property of the citizen in respect of which his office is to be exercised, because his predecessors in the office may have been in the habit of taking a like portion without objection or protest on the part of those with whose property they had been called upon to deal. The only contract which, as it seems to me, can possibly be inferred from an appointment to a public office created by statute, with special fees for the services rendered, and its acceptance is an agreement on his part to perform the duties of the office, and on the part of the public that he shall be entitled to the fees prescribed by the act when the services shall have been rendered."

These principles are by universal consent thoroughly established throughout this country, and the public welfare demands that they should be enforced. Payment from the public funds for all official duties rests alone upon legislative sanction, which is the exclusive compensation power of the government: *United States v. Shields*, 153 U. S. 88, 14 Sup. Ct. Rep. 635, 38 L. ed. 645; *Talbot v. East Machias*, 67 Me. 415; *White v. Inhabitants of Levant*, 78 Me. 568, 7 Atl. 539; *Sykes v. Inhabitants of Hatfield*, 13 Gray (Mass.), 347; *Hillman v. Board of Commissioners*, 84 Minn. 130, 86 N. W. 890; *Wight v. Board of Commissioners*, 16 Mont. 479, 41 Pac. 271; *Jones v. Commissioners*, 57 Ohio St. 189, 63 Am. St. Rep. 710, 48 N. E. 882; *Albright v. County of Bedford*, 106 Pa. St. 582; *Hope v. Hamilton County*, 101 Tenn. 325, 47 S. W. 487; *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506, 92 N. W. 520; *Snipes v. Winston*, 126 N. C. 374, 78 Am. St. Rep. 666, 35 S. E. 610.

In obedience to the foregoing reasoning and the authorities cited, the conclusion is plain that the appellants have without authority of law appropriated to their own use the public funds ⁴⁹² of the county of Norfolk, and that they should be required to restore the same to the public treasury, to the extent that they severally appear to be liable therefor.

Under rule 9 of this court, the appellees assign as cross-error the action of the circuit court in sustaining the pleas of the statute of limitations, set up in the answers of the appellants as a defense in part to the bill.

This is a civil proceeding for the recovery of certain sums of money claimed to be due by the appellants to the county of Norfolk, and the county is practically the complainant. The appellants are only constructive or implied trustees, and in such cases it seems to be well settled that the bar of the statute applies.

The right expressed in the maxim "Nullum tempus occurrit regi" is an attribute of sovereignty and cannot be invoked by counties or other subdivisions of the state. As to such subdivisions of the state the statute runs in the same manner and to the same extent as against natural persons: Wood on Limitation of Actions, sec. 53; 2 Dillon on Municipal Corporations, sec. 668; *Armstrong v. Dalton*, 4 Dev. (15 N. C.) 568; *Clements v. Anderson*, 46 Miss. 581; *County of St. Charles v. Powell*, 22 Mo. 525, 66 Am. Dec. 637; *City of Palle v. Scholte*, 24 Iowa, 283; *May v. School District*, 22 Neb. 205, 3 Am. St. Rep. 266, 34 N. W. 377; *Mount v. Lakeman*, 21 Ohio St. 643.

In a note to *Herrington v. Harkins*, 1 Rob. 591, in the Virginia Reports Annotated, page 273, it is said: "Statutes of limitations run against public corporations, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily are clothed with the attributes and incidents of sovereignty; yet when they have power to sue and be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons, unless exempt by positive law"; citing ⁴⁹³ *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 6 Am. St. Rep. 644, 1 S. E. 740, and *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977.

These authorities fully sustain the conclusion reached by the learned judge of the circuit court, that the appellants were entitled to the benefit of their plea of the statute of limitations.

Upon the whole case, we are of opinion that there is no error in the decrees appealed from, and they are affirmed.

A Taxpayer may Maintain an Action in equity, on behalf of himself and other taxpayers, to restrain public officers from paying out public moneys for illegal purposes; and may also, under proper circumstances compel public officers, and even third persons, to repay into the public treasury money already paid out illegally: *Webster v. Douglas County*, 102 Wis. 181, 72 Am. St. Rep. 870. See, too, *Ecroyd v. Coggershall*, 21 R. I. 1, 79 Am. St. Rep. 741; *Tukey v. Omaha*, 54 Neb. 370, 69 Am. St. Rep. 711; *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 36 Am. St. Rep. 438; note to *McCord v. Pike*, 2 Am. St. Rep. 98.

Limitations of Actions against municipal corporations is discussed in the extended note to *Bannock County v. Bell*, 101 Am. St. Rep. 144-188.

LEWIS v. APPERSON.

[103 Va. 624, 49 S. E. 978.]

DOWER—Conveyance of.—A deed signed by a married woman and a court commissioner conveying her husband's real estate, to which he is not a party, is ineffectual to bar her right of dower, under a statute providing that such right is barred, "when a husband and his wife" have signed a writing purporting to convey his real estate. (p. 906.)

DOWER can be Defeated or Barred only in some of the modes pointed out by law. (p. 907.)

MARRIED WOMEN.—The Doctrine of Equitable Estoppel does not generally apply to married women, especially in the absence of fraud. (p. 907.)

DOWER—Conveyance of—Estoppel.—Where a deed of a married woman of her dower fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground of recovery in a subsequent controversy. (p. 908.)

DOWER—Estoppel—Burden of Proof.—If it is claimed that a married woman is barred of her right of dower by her conduct in connection with her execution of a deed of her husband's lands to which he was not a party, the burden of proof is on the person asserting the estoppel to prove all of the elements necessary to establish it. (p. 910.)

Jeffries & Hill and Grimsley & Miller, for the appellant.

R. W. Moore and Barbour & Rixey, for the appellee.

625 **KEITH, P.** The suit of Partlow v. John H. Apperson was instituted in the circuit court of Culpeper county to subject the lands of the defendant to the payment of liens amounting to the sum of eighteen hundred and seventy-two dollars, none of which were superior to the widow's right of dower. Under decrees entered in this cause, the land was offered for sale and purchased by H. W. Lewis at twelve dollars per acre, amounting in the aggregate to two thousand two hundred and thirty-two dollars. On the 14th of September, 1886, the commissioners reported this sale, which was duly confirmed, and by a subsequent decree a reference was made to one of the master commissioners "to take, state and report to the court an account of the present value of the contingent right of dower of Mrs. P. M. Apperson, wife of John H. Apperson, in the land sold in this cause, and in taking said account said John H. Apperson and wife shall have notice."

Mrs. Apperson, the wife of John H. Apperson, had been at that time married about forty-five years. She was older than

her husband. She was not a party to the original bill of Partlow v. Apperson. The preponderance of the evidence does not show that she knew of the sale of her husband's land until after it had been made nor does it show that she had any notice of proceedings under the rule to commute her contingent right of dower. A highly respectable witness states that the subpoena was issued to her; that it was given to her husband to execute, and that he had seen it in the papers with service acknowledged in the handwriting of Mrs. Apperson. The paper itself has ~~been~~ disappeared, and Mrs. Apperson, on the other hand, testifies that she never acknowledged service of the commissioner's notice, and that she never was asked to do so. It does not appear by the preponderance of the evidence that there was an effort to sell the land free from the claim of dower. There is the testimony of witnesses to that effect, but other witnesses are positive that the auctioneer proclaimed more than once that the land was sold subject to dower. The purchaser swears that he bought understanding that he was to get a complete title; and that he paid twelve dollars per acre for land for which he would not have paid more than six dollars an acre subject to dower rights. He admits, however, that he knew that Mrs. Apperson was living, and had a contingent right of dower in this land.

It appears that the land sold for more than enough to pay all the liens reported against it, together with the sum of one hundred and seventy-one dollars and eighty-seven cents, which the commissioner ascertained to be the value of the contingent right of dower. The commissioner's report, showing the disbursement of the fund in his hands, contains this item: "By cash paid Mrs. P. M. Apperson, present value of her contingent right of dower, she having united in deed to purchaser, one hundred and seventy-four dollars and eighty-seven cents"; and at the foot of the report the commissioner of sale makes this statement: "In paying the present value of the contingent right of dower of P. M. Apperson (the widow), your commissioner only paid her the principal sum ascertained by Commissioner Stallard's report (one hundred and seventy-one dollars and eighty-seven cents); as her husband is still living he is entitled to the interest, and it was, therefore, included in the amount of balance paid him, as will be seen above." The commissioner of sale states in his deposition, that "I paid her the money, and took hers and her husband's joint receipt for the two amounts paid them. I drew the receipt and both of them

signed it in my presence." Mrs. Apperson, however, says that, "as a matter of fact, Mr. Apperson received all of the money, and I did not have the use of any of it"; and, ⁶²⁷ referring to the commissioner's deed in which she united, and which we will more particularly hereafter advert to, says: "If I had understood it I would not have signed it. I never employed any lawyer about this matter in my husband's lifetime, and never authorized my husband to do so, and never consulted any lawyer on the subject."

On the 30th of May, 1893, when her husband was still living, the commissioner of sale in the chancery cause of Partlow v. Apperson, executed a deed to the purchaser, in which Mrs. Apperson united, conveying this tract of land, and in it there appears this recital: "and whereas the said commissioner was directed to pay to P. M. Apperson, wife of J. H. Apperson, the commuted part of her contingent right of dower: Now this deed witnesseth, that for and in consideration of the premises and of the payment in full of the purchase money aforesaid by the said parties of the second part, the said commissioner as aforesaid doth give, grant, sell and convey with special warranty of title unto the said parties of the second part the aforementioned tract or parcel of land, and the said P. M. Apperson doth hereby relinquish and convey unto the said parties of the second part all right, title and interest she may have in said land in consideration of the commuted value thereof paid her by said commissioner." This deed was signed by the commissioner and P. M. Apperson, duly acknowledged before a commissioner in chancery on the 18th of September, 1893, and admitted to record on October 24th of the same year.

On the 16th of December, 1898, John H. Apperson died, and in June, 1901, Mrs. Apperson filed her bill claiming dower. The purchaser answered, denying her right, and from the record in the former suit of Partlow v. Apperson, which was exhibited with the bill, and the testimony of the witnesses, the facts appear that have already been related. The circuit court held that Mrs. Apperson was entitled to the relief asked for, and from that decree an appeal was allowed.

⁶²⁸ By section 2502 of the Code, in force at the date of this deed, it is provided, that "when a husband and his wife have signed a writing, purporting or contracting to convey any estate, real or personal, or any writing authorizing another to convey, or contract to convey any such estate, such writing may be admitted to record as to each of them according to the provisions

of section two thousand five hundred or two thousand five hundred and one, and when it shall have been so admitted to record as to the husband as well as the wife, or if it be a writing executed under a power of attorney, when such writing as well as such power of attorney shall have been admitted to record it shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any estate conveyed or embraced therein, as effectually as if she were, at the date, an unmarried woman. Such writing shall not operate any further upon the wife, or her representatives, by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which if it relate to her said right of dower or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit."

It is plain that the deed of the 30th of May, 1893, though signed, acknowledged and admitted to record as to Mrs. Apperson, was not of itself effectual to bar her right of dower, her husband not being a party to it. It is claimed however, that this deed together with the conduct of Mrs. Apperson in connection with the transaction under investigation were such as to bar her claim.

In volume 14 of *Cyclopedia of Law and Procedure*, page 931, it is said, that "as a general rule acts of the wife during coverture to operate as a bar of dower by way of estoppel must in effect ⁶²⁹ amount to one of the modes pointed out by the common law or recognized by statute as constituting a bar. It has been held, however, that acts and conduct sufficient to constitute an equitable estoppel will bar the right."

In *Martin v. Martin*, 22 Ala., at page 105, it is said: "Where the subject matter of litigation arises out of a contract either express or implied, it may be granted that a married woman may be estopped, like other parties, by acts or declarations upon which others have been induced to act, and against the truth of which it would work fraud and injustice for her to aver; but this doctrine can have no application to dower, which does not arise out of, nor is dependent upon, any contract. On the contrary, 'it is an estate which arises solely by operation of law, and not by force of any contract, express or implied, between the parties. It is the silent effect of the relation entered into by them; not as in itself incidental to the marriage

relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law': Park on Dower, 5. It has for its object the sustenance of the widow and nurture and education of her children, if she have any, and is favored in law. Indeed, such was the favor with which it was regarded by the ancient common law, that it grew into a maxim, 'that the law favoreth three things: Life, liberty, and dower.' Dower being an institution of positive law, can only be defeated or barred by some of the modes pointed out by the law." In support of the law as thus stated there are cited Cro. Jac. 111; 9 Coke, 170.

In *Rannells v. Gerner*, 80 Mo. 474, it is said that the legislature has provided but one mode whereby a married woman may relinquish her dower in the real estate of her husband, and that is by their joint deed, acknowledged and certified; and with reference to the doctrine of estoppel as applied to such cases, the court says: "Respecting the equitable subject ⁶³⁰ matter of defendant's answer, it is the established law of this state that estoppels in pais are not applicable to femmes covert except where regarded as femmes sole in consequence of possessing separate estates." In support of this a large number of authorities are cited, and the court then observes, that: "Isolated cases may, perhaps, be found supporting the views advanced by defendant's counsel, but they are opposed by the authorities heretofore cited, and, indeed, by the great current of authority."

In *Grim's Appeal*, 105 Pa. St. 375, the court said, speaking upon this subject: "If the heirs had been sui juris, they would under these circumstances certainly be precluded now from asserting a right inconsistent with the course which by their encouragement they induced the executor to pursue. It is objected, however, that certain of the heirs are married women, and as it does not appear that they were joined by their husbands in these acts of approval and encouragement, they are protected by their coverture. It is certainly true, as shown in a long line of cases, that a contract, void under the disability of coverture, cannot be made good by estoppel; neither a fraudulent denial of coverture, payment of purchase money, nor silent acquiescence in the making of improvements, nor all of these together, can, by way of estoppel, give validity to a contract void upon this ground."

In *Herman on Estoppel*, at section 581, the law is thus stated: "In order to give rise to an estoppel by deed the parties must ordinarily be sui juris, competent to make it effectual as a con-

tract, and the instrument so executed as to be binding in law. The deed of a married woman will not operate as an estoppel where it fails as a grant, or estop her from setting up an estate obtained subsequently or by purchase, against the grantee. This, like the grant, is limited to the estate the wife has at the time, and does not extend to an interest acquired after the ⁶³¹ execution of the deed, for she cannot bind herself subsequently by any covenant. Where the deed of a married woman fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground of recovery in a subsequent controversy. By common law the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or estoppel, because she was incapable of binding herself by covenants of warranty or by agreement to convey her real estate."

In some of the states, as appears from the author just cited, these restrictions are substantially abolished by statute; so that a mortgage deed given by a married woman with her husband's consent, with covenants of warranty, will inure by way of estoppel, against her, in cases of title subsequently acquired. But with us there is no such statute. On the contrary, it is expressly provided, that even where the husband is a party to the deed in which the wife unites, it shall not operate any further upon her representatives "by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which, if it relate to her said right of dower or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit." And here it may be well to remark that the contingent dower interest of the wife was not, at the time Mrs. Apperson united in the deed with the commissioner, a part of the separate estate of a married woman.

In *Lowell v. Daniels*, 2 Gray, 161, 61 Am. Dec. 448, the court speaking upon this subject, says: "The material question at issue between the parties is whether a married woman and her heirs may be barred of her estate by an estoppel in pais. She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed ⁶³² would be likewise void. If she were to covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them.

The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, cannot affect her interest in the estate, or that of the husband and children. . . . We think a married woman cannot do indirectly what she cannot do directly; cannot do by acts in pais what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate. This doctrine of estoppel in pais would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates."

In *Drury v. Foster*, 2 Wall. 24, 17 L. ed. 780, Mr. Justice Nelson said: "It is conceded in this case that the instrument of Mrs. Foster, signed and acknowledged, was not a deed or mortgage; that on the contrary it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to ⁶³³ authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient. But there are two insuperable objections to this view in the present case: 1. Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and 2. There could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled, and the instrument complete. Till then there was no deed to be acknowledged. The act of the feme covert and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing. It is insisted, however, that Mrs. Foster should be estopped from deny-

ing that she had signed and acknowledged the mortgage. The answer to this is that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *femes covert*. Instead of the transaction being a real one in conformity with established law, conveyances by signing and acknowledging blank sheets of paper would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated."

There are authorities which, conceding that a married woman cannot be estopped by her contract, hold that she may be estopped by a fraudulent act. It is needless to discuss this distinction. It will be time enough to undertake to define its extent when a case arises which renders it necessary. Mrs. Apperson was in this case guilty of no fraud, in relying upon which the appellant could have been misled to his prejudice. She has established a *prima facie* right to the relief sought by her, and the burden was upon those who sought to defeat it ⁶³⁴ to establish all the elements of an estoppel, assuming that such a defense would have been effectual. The preponderance of the evidence does not show that Mrs. Apperson, by word or deed, induced or encouraged Lewis in the purchase of this property. It does not show that she even had knowledge of his being the purchaser until after the sale was made to him. It is not shown by a preponderance of the evidence that she received the money in lieu of her contingent right of dower; or, if she did, that she advised with respect to her rights.

We are of opinion that the deed of the commissioner, in which Mrs. Apperson united, did not convey her dower; that she is not estopped by her conduct from asserting her right; that under the circumstances disclosed in this record we cannot burden that right with the money which she is alleged to have received during her coverture, in lieu of her contingent right of dower; and that, upon the whole case, the decree of the circuit court should be affirmed.

The Mortgage of a Married Woman, executed by her alone, is held insufficient to convey or release her right of dower: *Slocumb v. Ray*, 123 N. C. 571, 68 Am. St. Rep. 830.

Estoppel Against Married Women is the subject of a monographic note to *Trimble v. State*, 57 Am. St. Rep. 169-185. It is affirmed by some authorities that a married woman cannot lose her title to land

by estoppel in pais: *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. But see *Baillarge v. Clerk*, 145 Cal. 589, 104 Am. St. Rep. 75, and cases cited in the cross-reference note thereto; *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 97 Am. St. Rep. 1040; *Camble v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871.

NORFOLK AND WESTERN RAILWAY COMPANY v. FRITTS.

[103 Va. 687, 49 S. E. 971.]

RAILROADS—Liability for Fires.—When it is established that a fire was set out by sparks from the engine of a railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had availed itself of the best mechanical contrivances and inventions in known practical use, to prevent the burning of property by the escape of fire, and had exercised every reasonable precaution, in selecting competent employes, and in operating its trains. (p. 912.)

RAILROADS—Duty to Prevent Fires.—It is the duty of a railroad company to exercise every reasonable precaution to avoid injury to others, by scattering fire along its right of way, and when the danger of doing such injury is increased by the nearness of wooden buildings to its track, the accumulation of combustible material, either on its own or the adjoining land, the dryness of the season, and the direction of high winds, greater caution is required than is necessary when such conditions do not prevail. (p. 914.)

RAILROADS—Liability for Fires.—Unusual and unnecessary high speed of a railroad train, and the resulting emission of an unusually great quantity of sparks and cinders from the engine may become negligence on the part of the railroad company. It must, in regulating such speed take cognizance of the dryness of the season, the strength and direction of the wind, the danger to adjoining property from fire, and of any surrounding circumstances which increase the danger to others from fire thrown out by its engines. (p. 915.)

Downing & Richards and M. McCormick, for the appellant.

Scott & Staples, for the appellee.

688 HARRISON, J. This action was brought to recover damages for the destruction of certain property of the plaintiff, alleged to have been caused by fire communicated from the engine or engines of the defendant company, in consequent of its negligent equipment, management and operation of such engines.

There was a demurrer to the evidence of the plaintiff, and thereupon the jury assessed his damages at two thousand three hundred and sixty-six dollars and seventy cents, subject to the

opinion of the court upon the law. Upon consideration thereof, the learned judge of the circuit court overruled the demurrer, and gave judgment for the plaintiff in accordance with the verdict of the jury. From this judgment the case is before us for review.

No reasonable doubt can be entertained that the fire was set out by sparks from the engines of the defendant. Where this fact is established the law is well settled that the railway company ⁶⁸⁹ is presumptively chargeable with negligence, and must assume the burden of proving that it had availed itself of the best mechanical contrivances and inventions in known practical use, to prevent the burning of property by the escape of fire, and had exercised and observed every reasonable precaution in selecting competent employes, and in operating its trains: *Patteson v. Chesapeake etc. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207; *White v. New York etc. Ry. Co.*, 99 Va. 357, 38 S. E. 180.

Assuming that the defendant has shown that it had availed itself of the best mechanical contrivances to prevent the burning of property by the escape of fire, and had observed reasonable precaution in the selection of its employes, we come to the real question at issue—whether or not the defendant was guilty of negligence in its operation of the engines and train here involved.

It appears that the plaintiff, R. S. Fritts, was conducting a mercantile business at Success, a station on the line of the railroad of the defendant company, and that the buildings occupied by him for this purpose were wooden structures situated about thirty-five feet from the railroad track. The fire which destroyed these buildings and their contents occurred on March 26, 1902, at 1 o'clock in the daytime, it being a bright warm day, and in the midst of a very dry season. At the hour mentioned, a freight train of the defendant, consisting of thirty cars, carrying eight hundred and forty-one tons of freight and drawn by two engines, passed Success going south. The schedule time allowed fifteen miles an hour for the speed of the train; it was behind its schedule time and endeavoring to make it up, and did make up five minutes between White Post and Riverton, a distance of ten miles.

When the train passed the property of the plaintiff, at Success, it was running upgrade at the rate of thirty miles an ⁶⁹⁰ hour, double its schedule speed, and laboring very hard. The two engines were throwing out an unusual quantity of

sparks and cinders, and there was a high wind blowing directly from the engines in the direction of the plaintiff's property.

The question presented is, Would the jury, from the facts stated, have been justified in drawing the conclusion that the defendant company was operating its engines negligently?

The defendant insists that the speed of its train was not negligence per se, and that in regulating such speed it was under no obligation to take cognizance of the dryness of the season, the strength and direction of the wind, the danger to the plaintiff's property, nor any of the surrounding conditions and circumstances which increased the danger to others from fire thrown out by its engines; that if such obligations were imposed, the regular operation of railroads would be impossible.

This position is not reasonable, and is not sustained by authority. It is a well-settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Mere rate of speed, though unusual, is not negligence per se. But taken in connection with other circumstances rate of speed may be dangerous, and a dangerous rate of speed is negligence: *Chesapeake etc. Ry. Co. v. Clowes*, 93 Va. 189, 24 S. E. 833. In this case Judge Keith says: "We cannot say as a matter of law that the mere rate of speed is negligence, although it may be unusual. It is true that negligence is a relative term; that what may be negligence under one condition of facts would not only not be negligence, but the highest prudence, under a different condition of facts. The question for the jury always is, Was the act, taken in connection with all of its attending circumstances, negligent?"

It cannot be doubted that it is the duty of a railway company to exercise every reasonable precaution to avoid injury to others by scattering fire along its right of way. It is equally clear, ^{and} upon principle and authority, that when the danger of doing such injury is increased by the nearness of wooden buildings to its track, the accumulation of combustible material, either on its own or the adjoining land, the dryness of the season, and the direction of high winds, greater caution is required than is necessary when such conditions do not prevail. While ordinary care requires the employes of a railway company to recognize such conditions for the purpose of avoiding as far as possible, injury to others, such care is to be exercised, while at the same time giving due consideration to the interest of the railway service, and the duty of the company to its patrons and the public: *Thompson on Negligence*, sec. 2263; *Elliott on Railroads*, sec. 1228.

In the section just cited from Elliott on Railroads, the law is stated thus: "It is a well-settled principle that care in doing any particular act must be exercised in proportion to the danger attending the act. When the doing of any particular act is attended with unusual hazards, unusual care must be exercised but where the performance of the act is attended with only ordinary hazards, a less degree of care is required. These principles have frequently been applied in railway fire cases, for the circumstances under which fires are likely to occur and do occur are so varied that this degree of care must necessarily be employed. In proportion as the hazards increase, there should be a corresponding increase in the care exercised. Thus it has been held that it is the duty of a railway company, in an unusually dry season, when all inflammable material is like timber and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons. So, when the wind is blowing directly from an engine toward wooden buildings or combustible material, greater precautions may be required; and when a train is running through a densely populated country or village where there are a great ⁶⁹² number of buildings exposed to the hazards of fire, greater precaution must generally be exercised than is necessary when running through the country where there are no buildings. Unusual precautions are not required, such as the purchase and use of tarpaulins or other similar means to protect against fire."

This statement of the law is fully sustained by the adjudicated cases: *Marvin v. Chicago etc. R. R. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; *Pittsburg etc. R. R. Co. v. Noel*, 77 Ind. 110; *Fero v. Buffalo & State Line R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Riley v. Chicago etc. Ry. Co.*, 71 Minn. 425, 74 N. W. 171.

The case last cited was an action for damages caused by fire scattered from one of defendant's locomotives. It appeared that the country was unusually dry, and vegetation very inflammable, particularly along that part of the defendant's road where the fire in question occurred; also that on the occasion there was a very high wind. Upon review, the supreme court of Minnesota held that it was not error to instruct the jury that ordinary care was a relative term, and depended on circumstances and conditions, that in passing upon the management of defendant's engine they were to consider the conditions then prevailing, such as the dryness of the grasses, stubble and other vegetation near the track, and the speed and direction of the

wind; but on the other hand, they must give due consideration to the necessities of the railway service, and the duty of the defendant to its patrons and the public.

In the case at bar, as already seen, a freight train of the defendant with a load too great for one engine was speeding by the property of the plaintiff at the rate of thirty miles an hour, twice the speed contemplated by its schedule, and emitting an unusual quantity of sparks and cinders. There can be no question that the harder an engine is worked the more sparks and cinders it will discharge. The danger of fire is, therefore, ⁶⁹⁸ necessarily augmented by the speed of a train, especially when it is pulling upgrade as it was here. At this time the property of the plaintiff was greatly exposed to danger by reason of its nearness to the railroad, the dryness of the season and a strong wind blowing directly to it from the passing engines. The burden was on the demurrant to show the exercise of reasonable care in the operation of its train and engines.

It does not appear that the speed adopted, particularly in view of the prevailing conditions, was a necessity to the railway service, or a duty owed by the defendant to its patrons or the public. This was an ordinary freight train, and not one word is offered in explanation of the high rate of speed at which it was moving. The fire was set out by the engines of the defendant, and it was for the jury to say whether or not the act, taken in connection with all the attending conditions and circumstances, was the result of a negligent operation of its engines by the employes of the defendant. A consideration of this question was withdrawn from the jury by the demurrer to the evidence, and we are unable to say that they would not have been justified in finding a verdict for the plaintiff.

Sundry exceptions were taken during the progress of the trial to the action of the circuit court in admitting certain evidence offered on behalf of the plaintiff, and in refusing to strike out certain answers of the witness, Robert Grigsby, on his cross-examination. In the view we have taken of the case, it is unnecessary to pass upon these exceptions, for if their solution were in favor of the defendant company it could not alter the conclusion we have reached.

For these reasons the judgment of the circuit court must be affirmed.

Railroad Companies are required to exercise a high degree of care to prevent the kindling of fires by escaping sparks: *Missouri Pac. Ry. Co. v. Platzer*, 73 Tex. 117, 15 Am. St. Rep. 771; *Hendrick v. Towle*,

60 Mich. 363, 1 Am. St. Rep. 526. It is their duty to use such locomotives as are least likely to start fires: *Watt v. Nevada etc. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772. According to some authorities, they are required to use the best devices available to prevent the escape of fire from their engines: *Metzgar v. Chicago etc. Ry. Co.*, 76 Iowa, 387, 14 Am. St. Rep. 224. See, however, *Peter v. Chicago etc. R. R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500; note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 72. That it is the duty of railroad companies to keep their right of way free from combustible material, see *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715; *Watts v. Nevada etc. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772; *Lake Erie etc. R. R. Co. v. Clark*, 7 Ind. App. 145, 52 Am. St. Rep. 442. Proof that a fire originated from sparks emitted from a locomotive is regarded by most authorities as raising a presumption of negligence on the part of the railway corporation: *Louisville etc. R. R. Co. v. Marbury Lumber Co.*, 132 Ala. 520, 90 Am. St. Rep. 917, and cases cited in the cross-reference note thereto; monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71. Compare, however, *Meyer v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 639, 17 Am. St. Rep. 408; *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652; *Bernard v. Richmond etc. R. R. Co.*, 85 Va. 792, 17 Am. St. Rep. 102.

BURDETT v. COMMONWEALTH.

[103 Va. 838, 48 S. E. 879.]

CONTEMPT—Libel of Judge—Adjournment of Court.—The fact that a publisher erroneously thought that court had adjourned at the time of his publication of an insulting libel of the judge, or that such judge had in fact adjourned court at the time of such publication, is no defense for contempt of court in making such publication. (p. 918.)

CONTEMPT—Power to Punish for.—The power to punish for contempt of court is necessarily resident in, and to be exercised by, the court itself, and while the legislature may regulate, it cannot deprive courts of the power to summarily punish for contempts by providing for a jury trial in such case. (p. 919.)

CONTEMPT—Libel upon Court Proceedings.—Courts possess inherent power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy public confidence and respect for their judgments, and to obstruct the free course of justice. (pp. 920, 921.)

CONTEMPTS—Direct and Constructive.—The substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence of the court, it may proceed upon its own knowledge of the facts and punish the offender without further proof, issue, or trial in any form, but in dealing with indirect contempts, not committed in the presence of the court, the offender must be brought before it, by rule or some other sufficient process. The power of the court to punish is the same in both cases. (p. 922.)

CONTEMPT—Libelous Publication—Liberty of Press.—Summary punishment as for contempt of the publisher of a libelous ar-

article directed against the court, is not an invasion of the liberty of the press, and it makes no difference whether such article refers to pending or past proceedings. (p. 923.)

CONTEMPT—Liberty of Press.—Any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them, but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is answerable. (p. 923.)

S. B. Whitehead, for the appellant.

W. A. Anderson, attorney general, for the commonwealth.

⁸³⁰ **KEITH, P.** On the 30th of October, 1903, the county court of Nelson county caused a rule to be issued against J. M. Burdett and M. J. Webb "to show cause, if any they can, why they shall not be fined and imprisoned for contempt of this court." On November 6th Burdett filed his demurrer and answer, and a motion to have the case heard and determined by a jury; but the court overruled his demurrer and motion, adjudged the defendant guilty of a contempt of court, and sentenced him to pay a fine of fifty dollars, and to be confined in jail for a period of ten days. To this judgment the defendant obtained a writ of ⁸⁴⁰ error from the circuit court, where it was affirmed, and to the judgment of the circuit court a writ of error was awarded by one of the judges of this court.

It appears that Burdett was an apothecary in Nelson county, and that twelve indictments were found against him for selling at retail ardent spirits and malt liquors without a license. To these indictments he pleaded guilty, and a fine was entered up against him in one case of forty dollars, and costs in the other cases, amounting in the aggregate to seventy-five dollars and fifty-one cents which was paid to the sheriff of Nelson county on October 27, 1903.

On October 30, 1903, an article appeared in the "Nelson County Times" newspaper, signed by Burdett, in which he arraigns the conduct of the judge of the county court in a most severe and offensive manner. He charges substantially that the grand jury which found the indictment acted under the dictation and constraint exercised over them by the judge; that under his influence twelve indictments were found, when the question of guilt or innocence could have been established by making one offense a test case; that he had wished to vindicate himself before the public, but had been forced to com-

promise the prosecutions against him, and to pay the fine and costs which had been imposed. He charges the judge with not only having acted toward him in a harsh and arbitrary manner, but that his conduct was actuated by vicious and corrupt motives.

There can, therefore, be no doubt that the plaintiff in error was guilty of a gross and insulting libel, and it remains for us to consider whether, in the judgment rendered by the county court, punishing the act as a contempt, there was any error of law, for which it should be reversed.

The contention of the plaintiff in error is that at the time of the publication the term of the county court of Nelson county had ended; that if it had not ended, the court had⁸⁴¹ directed an adjournment, and had ordered the sheriff to make proclamation to that effect; and, thirdly, that the cases of the Commonwealth v. J. M. Burdett were ended, and the fines paid before the alleged contempt was committed.

With respect to the first contention, it is sufficient to say (conceding the circumstances to be material), that the term of the court had not ended, as the record proves, and with respect to the second, that it can hardly be considered a sufficient defense to the charge against him that the plaintiff in error had made a mistake with respect to a fact which had no bearing upon his guilt or innocence of the offense charged, but only upon his immunity from punishment. It is a plea by way of confession and avoidance. "It may be true," says the plaintiff in error, "that I was guilty of a contempt of court when I committed the act, but I thought the court had adjourned, and that under the law I could not be punished. I find that I committed a blunder, and I ask to be permitted to go free on that account." Such a plea could scarcely be received with favor by a court of justice. The first two assignments of error are, therefore overruled.

With respect to the third, we are of opinion that the cases of the Commonwealth v. Burdett had ended before the publication of the card. They had been tried, judgments had been rendered and satisfied, and, being criminal prosecutions, could not have been reopened at the instance of the commonwealth.

The learned attorney general properly concedes that "there are a large number of cases and authorities outside of Virginia, upon which counsel for plaintiff in error can fairly rely in his advocacy of his contention," that courts are without authority to punish as a contempt of court a publication with respect to

an ended cause. The law, as maintained by these cases, is thus stated in 7 American and English Encyclopedia of Law, second edition, 59: "A slanderous and libelous publication concerning the judge in relation ⁸⁴² to an act already done, or a decision rendered, cannot be punished by the court as contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt of tending to prejudice the cause, or to impede its progress." But this view omits all allusion to that kind of contempt which consists of scandalizing and defaming the court itself. To ascertain the law of this state in this respect we shall examine into the common law upon the subject.

We shall make no inquiry into the general power of courts to punish contempt summarily. That subject was fully considered in *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310, and the conclusion was reached that "there is an inherent power of self-defense and self-preservation in the courts of this state created by the constitution. This power may be regulated by the legislature, but cannot be destroyed or so far diminished as to be rendered ineffectual. It is a power necessarily resident in and to be exercised by the court itself, and the legislature cannot deprive such courts of the power to summarily punish for contempts by providing for a jury trial in such case."

Coming, then, to the precise point in judgment, in *Roach v. Garvan*, 2 Atkyns, 471 known as the "St. James Evening Post Case," Lord Chancellor Hardwicke said: "There are three different sorts of contempt. One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Blackstone's Commentaries, volume 4, page 285, defines contempt to consist among other things, in "speaking or writing contemptuously ⁸⁴³ of the court or judges acting in their judicial capacity; by printing false accounts of causes depending in judgment, and by anything, in short, that demonstrated a gross want of that regard and respect, which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people."

In 9 *Cyclopedia of Law and Procedure*, page 6, a constructive contempt is stated to be "an act done not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent or embarrass the administration of justice."

Barton, in volume 2, second edition, page 774, of his *Law Practice*, is to the same effect. "Contempt of court is a disobedience to the court, or an opposing or despising the authority, justice or dignity thereof": *Wyatt v. People*, 17 *Colo.* 253, 28 *Pac.* 961; *In re Dill*, 32 *Kan.* 669, 49 *Am. Rep.* 505, 5 *Pac.* 39; *Cartwright's Case*, 114 *Mass.* 230.

The subject has recently been investigated by the supreme court of Missouri in *State v. Shepherd*, 177 *Mo.* 205, 99 *Am. St. Rep.* 624, 76 *S. W.* 79. That court had rendered a judgment in the suit of *Oglesby v. Missouri Pac. R. R. Co.*, 177 *Mo.* 272, 76 *S. W.* 623, and the opinion and judgment of the court had been attacked in a most acrimonious article in a newspaper. Upon a rule to show cause the whole subject of contempt, at common law and in this country, is examined, a multitude of decisions considered, and the conclusion reached that at common law one class of contempt consisted in scandalizing the court itself, and need not relate to a pending suit. It may be observed that in the judgment rendered by the supreme court of Missouri, which was the subject of animadversion, the judges were divided, four of them uniting in the judgment which was the subject of criticism, and three of them dissenting, while in the judgment upon the proceeding for contempt the court was unanimous.

844 *In Commonwealth v. Dandridge*, 2 *Va. Cas.* 417, Judge White, in his opinion, says: "That to scandalize a court by speaking or writing, either in its presence or in its absence, is a high contempt, and how can a court be scandalized, except by scandalizing the judges or some one of the judges, who sit in it? A court, apart from its judges, exists only in abstract idea, in contemplation of law, and viewed thus apart from them, it has not, it cannot have, any moral character to be scandalized. But let its judges be considered as corrupt towards when acting in their judicial capacity, and it is instantly covered with opprobrium and contempt." Judge Dade, delivering an opinion in the same case, says: "Shall a judge be called independent who is unavoidably placed in a situation in which he comes in conflict with the jealousies and resentments of those upon whose interests he has to act, and be reduced to the alternatives of

either submitting tamely to contumely and insult, of resenting it by force, or resorting to the doubtful remedy of an action at law? In such a state of things, it would rest in the discretion of every party in court, to force the judge, either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guarantee against this, is to imagine a state of society which would render the office of the judge wholly unnecessary."

In *State v. Morrill*, 16 Ark. 384, the court says: "By the common law, courts possess the power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees, so essential to the good order and well-being of society, and to obstruct the free course of justice."

In *Pryor's Case*, 18 Kan. 72, 26 Am. Rep. 747, the court⁸⁴⁵ finally decided the case, and the attorney for the losing party wrote a letter to the judge, saying the decision "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe. . . . It is my desire that no such decisions or orders shall stand unreversed in any court I practice in." The court held that it was a criminal contempt, fined him fifty dollars, and suspended him from practice until the fine was paid, and the supreme court sustained the judgment.

In *Woolley's Case*, 11 Bush, 95, an attorney, on a motion for a rehearing, charged "that the court had overlooked the facts of the case; that it had assumed facts having no place in the proof, and ignored others which stood out on every page of the record; that it was careless and indifferent to the rights of a litigant, and that the result of this carelessness and indifference was a ruinous, disastrous, and unjust judgment against a party wholly innocent of all offense." The court pronounced the offense to be of a nature too grave to be silently overlooked. The defendant was cited for contempt, and disclaimed under oath any intention to commit a contempt, and in consideration of this condition his fine was assessed at the nominal sum of thirty dollars.

In *Chadwick's Case*, 109 Mich. 588, 67 N. W. 1071, the defendant, an attorney for the losing party in a case that had been decided by the supreme court of Michigan, wrote and pub-

lished an article in the "Port Huron News," criticising the decree, and in it charged the judge with unfairness and improper conduct. The supreme court held it to be a contempt of court, and that the power to punish for contempt existed as well after a case was finally disposed of as where it was still pending.

It may be well to observe that the substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence ⁸⁴⁶ of the court, it is competent for it to proceed upon its own knowledge of the facts, "and to punish the offender without further proof, and without issue or trial in any form": *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. ed. 405; *Ex parte Wright*, 65 Ind. 508; *State v. Woodfin*, 5 Ired. (27 N. C.) 199, 42 Am. Dec. 161.

In dealing with indirect contempts—that is such as are committed not in the presence of the court—the offender must be brought before the court by a rule or some other sufficient process; but the power of the court to punish is the same in both cases.

In the nature of things, why should not defamatory and scandalous criticisms upon a court or judge, with respect to an ended cause, be punished as a contempt? It is true that it can no longer injure the particular litigant, but it degrades the administration of justice by bringing the courts and judges into disrepute.

In *Commonwealth v. Dandridge*, 2 Va. Cas. 417, already cited, the court said: "Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not so far as to touch his past conduct. In reason, I see but one pretense for this distinction. Threats and menaces of insult or injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And, if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, 'If he render a certain judgment against me, I will insult or beat him.' For this he ⁸⁴⁷ may be attached. But if (the judgment having been rendered) this insult be actually offered, an attachment no longer

lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles—the only true test—by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal.”

We, therefore, conclude with the court in Morrill’s case that “by common law, courts possessed the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees so essentially necessary to the good order and well-being of society, and most effectually obstructed the free course of justice.”

Nor do we think that the summary punishment as for contempt, of a newspaper article, constitutes an invasion of the liberty of the press. With respect to this feature of the case, it can, of course, make no difference whether the article refers to a pending or a past transaction.

In *State v. Frew & Hart*, 24 W. Va. 417, 40 Am. Rep. 257, it is held that a publication in a newspaper with reference to a case pending and undetermined in the supreme court of appeals, charging three of the four judges of the court with attending a political caucus more than a year before, and advising the action out of which the case arose, promising the caucus to hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention for political purposes, was a contempt of court, for which it might be summarily punished.

And in *State v. Morrill*, 16 Ark. 384, it is said “that any citizen ⁸⁴⁸ has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is responsible.” In this statement of the law, we heartily concur: *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79.

Such being the common law applicable to the case, the courts of Virginia are bound to administer it until it has been changed by competent authority.

There is a reasonable jealousy felt by the public with respect to the exercise of the summary power to punish for contempt. Especially is this true as to contempts which consist in "scandalizing the court." There is a natural apprehension that personal considerations may influence and bias the judgment of the court. It is, indeed, a delicate matter, and one with respect to which the courts should act with the utmost caution and reserve. That they have done so in this commonwealth, its judicial history fully proves. But while the duty is a delicate one, it is one which cannot be shirked, and the faithful discharge of which is essential to the administration of justice. The courts are the courts of the people; the judges are the servants of the people; and it is their highest duty to the people to see that the streams of justice are kept pure and uncontaminated. If the charges brought in the article which constitutes the contempt in this case be true, then the judge of the county court of Nelson deserves the scorn of all good men. In defaming him, the county court and justice as therein administered were brought into utter disrepute.

Twelve indictments were found against the plaintiff in error for selling intoxicating liquors without a license. He claims in his card that he was innocent of the charge. He saw fit to ⁸⁴⁹plead guilty. He had the same opportunity that is afforded to any citizen to appear before the tribunals of his country and to make his defense. Upon his trial he could have appeared in person or by attorney. Everything pertinent to the case would have been given to the jury, and to the public. Instead of resorting to this means of vindicating his character, he has chosen to plead guilty to the indictments against him, and to resort for his vindication to a defamatory criticism of the court, which rests upon his unsupported statement.

Upon the whole case we are of opinion that the judgment of the circuit court should be affirmed.

Contempt of Court by libelous newspaper publications is discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585. Such contempts are also classified, and the manner of their punishment prescribed, at great length in the case of *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624. It is stated in that case that scandalizing a court itself is a criminal contempt, and the contempt need not relate to a cause still pending. That courts have an inherent power to punish contempts, which cannot be abridged by the legislature, see *Mahoney v. State*, 33 Ind. App. 655, 104 Am. St. Rep. 276; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

**ROBERTSON v. CHICAGO, ST. PAUL, MINNEAPOLIS
AND OMAHA RAILWAY COMPANY.**

[122 Wis. 66, 99 N. W. 433.]

DEATH OF HUMAN BEING, Action for by Resident of Another State.—Under a statute creating a liability for the killing of a human being by willful act, neglect, or default, a recovery may be had, though the person killed and the person in whose behalf the recovery is sought were residents of another state. (p. 929.)

EXECUTORS AND ADMINISTRATORS—Foreign Administrator, When may Sue.—An action may be maintained by an administrator appointed in another state to recover for the negligent killing of his intestate in this state, such appointment having been made at the domicile of the decedent. (p. 930.)

Action by the plaintiff as administratrix of John Robertson, deceased, to recover for his death alleged to be due to the negligent act of the defendant's servants. It appeared by the complaint that the decedent and the plaintiff, who was his widow, were at the time of his death both residents of the county of Kent, in the state of Michigan, but that the negligent act and the resulting death occurred near Fairchild, in the state of Washington, and that the plaintiff had been appointed administratrix by the probate court of such county of Kent. A demurrer to the complaint was overruled, and the defendant appealed.

Pierce Butler and Frawley, Bundy & Wilcox, for the appellant.

F. D. Larrabee, James A. Frear and N. H. Clapp, for the respondent.

⁶⁸ CASSODAY, C. J. 1. Two grounds of demurrer are assigned. One is that the complaint does not state facts sufficient to constitute a cause of action. There is no claim that it states a cause of action which would have survived under section 4253, Statutes of 1898. A cause of action which so survives has been held to be a cause of action possessed by the deceased person, and preserved for the benefit of his estate: *Lehmann v. Farwell*, 95 Wis. 185, 60 Am. St. Rep. 111, 70 N. W. 170, 37 L. R. A. 333; *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137, 149, 153, 164, 171, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579. In the case at bar the plaintiff claims the right to recover under sections 4255, 4256, Statutes of 1898. The meaning ⁶⁹ of these sections has been made clear by recent decisions of this court. Thus it has been held that "the right of action given by" those sections "to certain beneficiaries therein named is personal, and the damages are limited to a mere indemnity for the pecuniary injury resulting therefrom to such beneficiary, and the action therefor does not survive the death of such beneficiary, but abates upon his death, and cannot be revived in favor of his administrator": *Schmidt v. Menasha W. Co.*, 99 Wis. 300, 74 N. W. 797. So it has been held that: "The liability created by section 4255, Statutes of 1898, in case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued is for the benefit of certain relatives of the decedent mentioned in section 4256, Statutes of 1898, and in default of such relatives there is no liability": *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

In the same case it was held that "The right of action for an injury to the person which survives under section 4253 is separate and distinct from the loss to surviving relatives recoverable under sections 4255 and 4256."

See, also, *Staeffler v. Menasha W. Co.*, 111 Wis. 483, 487, 87 N. W. 480; *McMillan v. Spider Lake etc. L. Co.*, 115 Wis. 332, 336, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589. This court has also held, in effect, that the amount recovered in such action constitutes no part of the estate of the deceased, but belongs to and must be paid over to the beneficiaries named in section 4256, Statutes of 1898: *Hubbard v. Chicago etc. R. Co.*, 104 Wis. 160, 164, 76 Am. St. Rep. 855, 80 N. W. 454. That section of the statute declares that "the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her": Stats. 1898, sec. 4256.

Here it appears from the complaint that the husband was killed by the "wrongful act, neglect, or default" of the defendant, and that his widow survived him. Had they both been residents and citizens of this state at the time of his ⁷⁰ death, and the administratrix had been appointed here, then, with the other facts alleged, there could have been no doubt of the right to recover. But it appears from the complaint that neither of them were residents or citizens of this state at the time of his death, but, on the contrary, it appears that both were citizens of and resident in Kent county in the state of Michigan at the time. The important question presented is whether the right of action is defeated merely because of such residence and citizenship in Michigan. For that reason counsel for the defendant claim that the action cannot be maintained, and in support of such contention rely largely on *McMillan v. Spider Lake etc. L. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589. In that case the person was killed in Bayfield county in this state. He left no beneficiary referred to in the section of the statute cited, except his mother, who was at the time of his death, and for a long time prior thereto had been, a resident and citizen of Canada, and she never lived in nor became a citizen of this state nor of the United States. The action was brought by an administrator appointed by the county court of Bayfield county, and, in view of the fact that the action had no reference to the possession, enjoyment, or descent of property, it was held, in effect, that the sections of the statutes cited did not give to the mother, as such nonresident alien relative of one so instantly killed, or who died without conscious pain, a right of action for the loss sustained by reason of such death. It was there said: "The question is not whether the legislature had power to give such right of action, but whether the sections relied upon did give such right of action."

It was there claimed, and this court, in effect, conceded, that the right to maintain the action had been given by the statutes in general terms, and was broad enough to include aliens. But the logic of the opinion is that this court would not, contrary to the general rule as held in England and this country, presume that the legislature intended to include ⁷¹ aliens. Quoting from the opinion of the court in a Pennsylvania case, where the facts were quite similar, it was there said: "Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their

own country, or to put burdens on our own citizens to be discharged for their benefit": *McMillan v. Spider Lake etc. L. Co.*, 115 Wis. 337, 338, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589, citing *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525, 528, 529, 59 Am. St. Rep. 676, 37 Atl. 558.

But can that be truthfully said of the residents and citizens of the several states? Of course, the several states are bound together with constitutional obligations and restrictions as to each other not existing between them and foreign countries. Among other things, the courts of the several states are constantly giving effect "to the public acts, records, and judicial proceedings" of other states, and to the "privileges and immunities of citizens" of other states, in obedience to constitutional guaranties: U. S. Const., art. 4, secs. 1, 2. The right to maintain actions in the courts of this state for personal injuries happening in other states has repeatedly been sanctioned by this court: *Curtis v. Bradford*, 33 Wis. 190; *Eingartner v. Illinois S. Co.*, 94 Wis. 70, 78, 79, 59 Am. St. Rep. 859, 68 N. W. 664, 34 L. R. A. 503; *MacCarthy v. Whitcomb*, 110 Wis. 113, 122, 123, 85 N. W. 707; *Bain v. Northern Pac. Ry. Co.*, 120 Wis. 412, 98 N. W. 241, 242, 244. In this last case the plaintiff's intestate, while a resident and citizen of Douglas county, Wisconsin, and while in the employ of the defendant, was killed in Minnesota by the alleged negligence of the defendant; and it was held that the action was maintainable in a court of this state by the widow, who had been appointed administratrix by the county court of Douglas county, notwithstanding the right of action was given by the statutes of Minnesota. Such ruling is in harmony with the decisions of the supreme court of the United States. Thus it has been held by that court: ⁷² "A cause of action founded upon a statute of one state conferring the right to recover damages for an injury resulting in death may be enforced in a court of the United States sitting in another state if it is not inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced": *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593, 604-606, 12 Sup. Ct. Rep. 905, 36 L. ed. 829.

In that case Mrs. Cox brought the action in a federal court in Texas for the death of her husband, caused by the alleged negligence of the company in Louisiana, under a statute of that state giving the right of action. To the same effect, *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 197, 198, 14

Sup. Ct. Rep. 978, 38 L. ed. 958; *Stewart v. Baltimore & O. Ry. Co.*, 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537. These cases hold that Lord Campbell's act and similar statutes are not penal in their nature, but merely authorize a civil action to recover damages for a civil injury. As held in the last case cited the purpose of such statutes "is to provide the means for recovering the damages caused by that which is in its nature a tort, and where such a statute simply takes away a common-law obstacle to a recovery for the tort an action for that tort can be maintained in any state in which that common-law obstacle has been removed, when the statute of the state in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced." Here there is no attempt to enforce a right of action under a statute of any other state. On the contrary, the plaintiff is here seeking to enforce, in the courts of this state, a right of action which she claims to have been created by and given to her by the statutes of this state. Certainly, the maintenance of such an action by a resident and citizen of another state is not inconsistent with any statute of this state, nor contrary to the public policy of this state.

The precise question is whether the plaintiff, as widow of the deceased, is included in the statute. As indicated, the right of action is given by the statutes in general terms, and ⁷³ is broad enough to include residents and citizens of other states. In view of the relations and obligations between the several states and the rights and duties of the citizens of each, we think it may be fairly presumed that the legislature did intend to include among the beneficiaries mentioned in section 4256, Statutes of 1898, residents and citizens of other states. It follows that the complaint states a good cause of action.

2. The other ground of demurrer is that the plaintiff has not legal capacity to sue. She brings this action in her representative capacity as administratrix of the estate of the deceased, appointed by a court in Michigan. It appears from the complaint that the deceased left no estate in Wisconsin to be administered. We agree with counsel for the appellant that the statute (Stats. 1898, sec. 3267) which authorizes executors or administrators appointed in any other state to prosecute or defend any action or proceeding relating to estates or property in this state is not broad enough to include this action, for the simple reason that the cause of action here sued upon is no part of the estate of the deceased husband, and

that, if a recovery should be had, the money would belong to the widow and not the estate. Nevertheless, we are constrained to hold that the widow has the right to bring this action in her representative capacity as such administratrix. We base this conclusion upon the wording of the statute, which declares that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her": Stats. 1898, sec. 4256. That section and the section immediately preceding created a new right of action, and imposed upon such personal representative a new duty. It appears from the complaint that a duly authenticated copy of the original letters of administration on the estate of the deceased, granted to the plaintiff by the probate court of Kent county, Michigan, was duly filed ⁷⁴ in the county court for St. Croix county. Full faith and credit should be given to such judicial proceeding in the Michigan court: U. S. Const., sec. 1, art 4; *Murray v. Norwood*, 77 Wis. 405, 46 N. W. 499. Thus it appears that the plaintiff was duly appointed such personal representative. There are certainly adjudications authorizing her to bring this action as such representative: *Phillips v. Chicago etc. Ry. Co.*, 64 Wis. 475, 25 N. W. 544; *Hutchins v. St. Paul etc. Ry. Co.*, 44 Minn. 5, 46 N. W. 79; *Findlay v. Chicago etc. Ry. Co.*, 106 Mich. 700, 64 N. W. 732; *Morris v. Chicago etc. Ry. Co.*, 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 143; *Brown v. Louisville etc. Ry. Co.*, 97 Ky. 228, 30 S. W. 639. According to these adjudications there can be no doubt but that such personal representative might have been appointed in this state.

The suggestion that, because the plaintiff was not appointed such representative in this state, she therefore is not amenable to the courts of this state, and hence might divert the amount recovered without being answerable therefor, is without merit. In that regard it is enough to say that as such personal representative she is answerable to the courts of Michigan, where it may be assumed the rights of the beneficiary will be protected. Besides, in this case the beneficiary and such personal representative is the same person, and hence there is no danger of such diversion. We must hold that the action is maintainable in the name of the plaintiff as such personal representative.

By the Court. The order of the circuit court is affirmed.

Whether an Action for a Wrongful Death is transitory and maintainable in a state other than where it occurred, is discussed in the recent cases of *McGinnis v. Missouri Car etc. Co.*, 174 Mo. 225, 97 Am. St. Rep. 553; *St. Louis etc. Ry. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65, and cases cited in the cross-reference note thereto; *Neganbauer v. Great Northern Ry. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674; note to *Attrill v. Huntington*, 14 Am. St. Rep. 353-355. And whether such actions can be maintained by nonresident aliens is discussed in *Renland v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534, and cases cited in the cross-reference note thereto.

CHIPPEWA BRIDGE COMPANY v. CITY OF DURAND.

[122 Wis. 85, 99 N. W. 603.]

PRACTICE.—General Findings that all the material allegations of the plaintiff's complaint which are controverted and denied by the answers are unproved and untrue, and that all the material allegations of the answers are proved and true, are forbidden by the statute of Wisconsin, but they do not require a reversal of the judgment. (p. 936.)

MUNICIPAL CORPORATIONS—“Work,” Contracts for, Meaning of.—A statute requiring that all contracts for work ordered by the common council of a city shall be let to the lowest, reasonable and responsible bidder is not restricted to the mere expenditure of physical or mental energy to some corporate end, but includes contracts for bridges and other structures needed by a municipality, to be contracted for according to the merits of competing bidders. (p. 938.)

MUNICIPAL CORPORATIONS—Contracts of for Work not Let to the Lowest Bidder.—Where a statute provides that work shall be let to the lowest, reasonable and responsible bidder, and that all bids and proposals shall be sealed and directed to the common council and accompanied by a bond, the power to make contracts depends on substantial compliance with the statute, and if a contract is made in some other way, it constitutes no warrant for the disbursement of public moneys. (pp. 938, 950.)

MUNICIPAL CORPORATIONS.—Contracts Made in Violation of Law by a Municipal Corporation do not constitute any claim against it, whether such contracts were made in good or bad faith, or constitute good bargains or not, though fully complied with and a taxpayer may maintain an action to prevent the paying out of moneys thereunder, and officers who participate in transferring the possession of money from the city treasury under such contracts are liable to a judgment for its restitution. (pp. 938, 939, 950.)

A MUNICIPAL CORPORATION cannot Ratify a Contract Made in Violation of Its Charter Provisions, unless the acts of ratification would be sufficient to support a contract as an original matter. (pp. 939, 950.)

MUNICIPAL CORPORATIONS—Proposals for Public Work, Necessity for Plans and Specifications.—Where the manner prescribed for letting public contracts includes the element of competition between rival bidders, and cannot be executed in spirit

without reasonably definite plans and specifications for the proposed work being provided for the use of bidders, and on notice being given of the facts in some way reasonably calculated to attract the attention of all persons liable to desire to enter the competition, if given an opportunity to do so, then such requirements must be regarded as a part of the law by necessary implication. (pp. 940, 941.)

MUNICIPAL CORPORATIONS—Public Work—Change of Plans and Specifications—New Opportunity for Bidding.—The plans, specifications and terms submitted as a basis for bidding on a contract for public work must not be changed, except in a manner to affect alike all persons bidding and desiring to bid, and if a change of a substantial nature is made either in the character of the proposed structure or the terms of a proposed contract after the first competition shall have been completed, there must be a second opportunity given to bid upon the new basis. (pp. 941, 942.)

MUNICIPAL CORPORATIONS—New Work.—The Requirement that Bids for Public Work Shall be Sent to the Common Council Under Seal implies that the bids are to be opened in the presence of the council and all so treated at the same time, and when they are taken up for consideration, thus, in a measure, precluding publicity as to the contents of the respective bids, and opportunities for collusion between bidders, and negotiations between members of the council and bidders. (pp. 942, 943.)

MUNICIPAL CORPORATIONS—Public Work, Private Negotiations for After Receiving Sealed Proposals.—If, after advertising for and receiving sealed proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the common council has no authority to favor one of the bidders by negotiation with him privately, changing the scope of the work to be done or the terms of payment therefor in consideration of the reduction of his offer. All persons desiring to bid upon the work and willing to comply with the terms prescribed must have equal opportunities to do so; and if the work is not awarded upon the first competition for any legitimate reason, it must be submitted to a second, with full opportunity as before for all persons desiring to participate to do so. (p. 943.)

MUNICIPAL CORPORATIONS—Parol Evidence.—Evidence Aside the Official Record is not permissible to show the proceedings of a municipal corporation, where the law requires such a record to be kept, where the admission of such evidence will have the effect to vary or contradict the record, but such evidence is receivable for the purpose of showing occurrences which, through oversight or other cause, were not recorded. (p. 945.)

MUNICIPAL CORPORATIONS, Correcting Records of.—If the record of a municipal corporation incorrectly states the time to which a meeting of the common council was adjourned, the only way to proceed to make competent evidence thereof is, first, to have its clerk amend its record, if he will, to conform to the facts; and second, if he refuses, to coerce him to do so by mandamus proceedings. (pp. 945, 946.)

PRACTICE—Leave to Amend Complaint.—It is error, on a trial, when it is shown that a contract made for public work with a bridge company was materially different from its bid, to refuse to permit an amendment to the complaint setting forth this fact, if there is no room for holding that the plaintiff was guilty of laches

in not bringing the fact to the attention of the court earlier, and it is perfectly apparent that the fact has some bearing upon the responsibility of the defendants. (p. 946.)

PUBLIC OFFICERS, Good Faith of, When does not Protect. In an action against public officers for paying out money under a contract entered into in defiance of the charter of a municipal corporation, they are not relieved from liability by a finding that in making the contract they acted in the utmost good faith. If officers knowingly or willfully use moneys contrary to law, but otherwise to accomplish a legitimate municipal purpose, they are guilty, in a legal sense, of acting in bad faith and of an actionable misappropriation of such money, regardless of their good intention. (p. 947.)

LACHES, Plaintiffs, When not Chargeable with, After the Commencement of an Action.—The finding that the defendants did certain things or perfected certain work prior to the trial of an action and during its pendency, and thereby incurred considerable expense, cannot relieve them from liability. The plaintiff cannot be chargeable with laches because, after the commencement of action, the defendants proceeded to complete the work under a contract which is by the plaintiff's complaint assailed as invalid. (p. 948.)

EQUITY—Taxpayer, Denial of Relief to Because of His Personal Interest.—A court of equity is not justified in denying redress to a taxpayer suing to prevent the paying out of money for the construction of a bridge, the contract for which was made in defiance of a municipal charter, by the fact that he was the owner of a toll bridge, the value of which will probably be diminished by the new bridge to be constructed. Such a plaintiff has the same right to prevent the misuse of public money upon an illegal contract for a second bridge as if his private interests were less. (pp. 948, 949.)

Suit by a taxpayer to prevent an unlawful use of public money. The following constitutes a summary of the findings of the trial court:

"1. Plaintiff is a private corporation organized under the laws of Wisconsin. Defendant city of Durand is a municipal corporation organized and existing under chapter 252, Laws of 1887, and the acts amendatory thereof. Since the commencement of the action defendant J. J. Morgan has been the mayor of such city. Defendant Finley Goodrich, at the time of the commencement of this action, was its treasurer, and Charles McDonald its city clerk. Defendant American Bridge Company is a corporation organized under the laws of New York. The other defendants, during the time mentioned in these findings, were doing business as copartners under the name of the Business Men's League of said city.

"2. Said city, at the times herein mentioned, possessed authority under chapter 430, Laws of 1901, to construct a bridge across the Chippewa river, and prior to the proceedings hereafter mentioned to that end the city duly procured and had in its treasury for that purpose \$25,000.

"3. Said city purchased material for a draw span for such bridge from the American Bridge Company, and let a contract for the superstructure of the bridge to such company, and also a contract for the substructure of the bridge to said Business Men's League.

"4. Such contracts were let to the lowest reasonable and responsible bidder and in the manner best calculated to secure competition in bidding, and in the customary manner of letting such contracts. In the letting of such contracts the provisions of the charter of the city in respect to the matter were substantially complied with. At an adjourned meeting of the council of said city held December 21, 1902, the bids for the superstructure were considered and the contract was awarded to the American Bridge Company it being the lowest reasonable and responsible bidder, and the lowest bidder as well. January 3, 1902, the city made a contract in due form with said bridge company in accordance with said award, taking from it a bond to secure the performance of such contract, as required by the charter of the city, which bond was duly approved.

"5. January 13, 1902, said municipality considered the bids for the substructure for such bridge and awarded the contract in respect thereto to said Business Men's League for \$9,000, it being the lowest responsible bidder therefor. January 18, 1902, a contract was made in due form according to such award, a bond being taken to secure performance thereof, as required by the charter, which bond was duly approved.

"6. The provisions of the charter of said city governing the subject were complied with in making the contracts aforesaid, and in auditing and paying the claims thereunder.

"7. Before this action was tried the said Business Men's League had fully performed the contract aforesaid, and the said bridge company had partially performed its contract.

"8. The acts of the officers of said city in respect to the matters herein referred to were lawful and in good faith, performed with the purpose of securing the best results.

"9. Plaintiff, though suing as a taxpayer, owned and operated a toll bridge across the Chippewa river at said city, and was moved to commence this action for the purpose of protecting its private business, and on that account it has no standing in a court of equity."

The common council approved of a contract with the American Bridge Company for the superstructure on December 30, 1901, and ordered the mayor to execute such contract, which

was done January 2, 1902. On January 13th of the same year a bid of the Business Men's League for the superstructure was accepted, and a contract executed accordingly. Bonds were given for the performance of both contracts, but no bond accompanied the bid, nor was any requirement in that respect made by the council, as the charter provided. The mayor sent a communication to five bridge companies soliciting bids for the superstructure, including the use of a draw span. The communications contained a diagram showing the general characteristics of the span to be used and information as to the number of spans required, and stated that each bidder would be permitted to arrange details to suit its own manufacturing facilities, subject to the general specifications and to the approval of the city engineer; that the bids in each case should include the expense of putting in place the draw span furnished by the city; that all bids should be sent to the writer by December 16, 1901; and there was no other solicitation for bids for the superstructure except some orally made by the mayor and the city engineer to two bridge companies, one of which obtained the contract. Prior to December 17, 1901, bids had been received in response to the communications aforesaid as follows: American Bridge Company, \$16,625; King Bridge Company, \$14,000, and twenty per cent on cost of erecting draw; Waukesha Bridge Company, \$15,630. No action was taken on these bids on December 17th. Afterward, the American Bridge Company, by oral communications and negotiations, reduced its bids to \$15,000 and concessions were made to it. No action was taken by the common council as to auditing any of the claims under the contract. The contract actually awarded to the American Bridge Company varied in substantial particulars from the terms stated in the mayor's communications. There was evidence tending to show that the municipal officers were active, after the commencement of the action, in placing the money designed for the payment of the bridge beyond the reach of any judgment or order which the court might make. The plaintiff was a taxpayer and privately interested in preventing the construction of the bridge in question, because of its ownership of a toll bridge.

The record of the meeting of the common council of December 17, 1901, stated that an adjournment was taken until December 23, 1901. Oral evidence at the trial was received from the city clerk that there was no meeting in the meantime, but oral evidence was permitted, against objections of the plain-

tiff's counsel, that a meeting occurred on December 21, 1901, at which the bids on file for the superstructure of the bridge were considered, and the bid of the American Bridge Company accepted.

Judgment was rendered in favor of the defendants dismissing the action, with costs, and plaintiff appealed.

Bundy & Wilcox, for the appellant.

C. W. Gilman, W. F. Plummer and G. M. Hilliard, for the respondents.

⁹¹ MARSHALL, J. In addition to the findings referred to in the foregoing, the learned circuit judge found in the following language:

"All the the material allegations of plaintiff's complaint which are controverted and denied by the answers herein are unproven and untrue."

"All the material allegations of the various answers herein are proven and true."

⁹² It greatly economizes judicial labor to make such findings, but is a plain violation of the commands of section 2863, Statutes of 1898. That section, as plainly as language can indicate it, lays upon trial judges the duty in such cases as this of finding specifically upon each material issuable fact. We hope soon to see that the bad practice of making mere general findings in defiance of the plain mandate of the statute and the admonitions of this court as to the erroneous character thereof has been wholly discontinued. Such findings as those quoted do not amount to an attempt to comply with section 2863, and what was said in *Farmer v. St. Croix P. Co.*, 117 Wis. 76, 93 N. W. 830, and *Milwaukee Nat. Bank v. Gallun*, 116 Wis. 74, 92 N. W. 567. They obviously do not bear the impress of being the result of a careful consideration of the evidence upon each issuable fact required to render the same worthy of being regarded as verities unless shown to be contrary to the clear preponderance of the evidence. They ought to and will be considered outside of such rule. Thus, while the error of violating the statute in respect to the matter will not be deemed reversible error, such importance of compliance therewith will be obvious as to probably be helpful in securing it.

Appellant's case depends primarily upon whether the word "work" in section 13, subchapter 4, of the respondent city's

charter (Laws 1887, c. 252); is limited to the mere exercise of human energy, with or without the use of appliances to render the same efficient, instead of extending to the products of such energy, such as a bridge, a building, or any one of a great many things that might be mentioned, not mere matters of merchandise. The lexical meaning of the word covers both, though the former is the more common meaning. Mere physical or mental exertion to accomplish an end is work; so is that upon which one labors, and also that produced thereby: Webster's Dictionary. That the word includes the ⁹³ latter meaning in the law in question hardly admits of reasonable controversy. The language of such law is as follows: "All contracts for work ordered by the common council of said city, the expense whereof shall exceed the sum of fifty dollars, shall be let to the lowest reasonable and responsible bidder who shall have complied with the requirements hereinafter set forth."

One of the most familiar rules for judicial construction would require the word "work" as thus used to include the products of work other than mere merchandise, if there were any ambiguity in respect thereto calling for judicial construction, which is doubtful. Judicial interpretation or construction never legitimately begins except at the point where certainty so far ends that two or more reasonable meanings are apparent. "The effect and consequences, and the reason and spirit" of an enactment are to be looked to in solving any ambiguity therein, and are to prevail within the reasonable scope of the language used if the legislative purpose in that regard can be fairly said to be therein expressed: *Harrington v. Smith*, 28 Wis. 43; *Wisconsin Ind. School v. Clark Co.*, 103 Wis. 651, 79 N. W. 422. The reason for such enactments as the one in question is, in the main, to preclude public officers from making contracts in such a way as to enable them to sacrifice the public interests to satisfy favoritism, mere improvidence, or to a corrupt desire for private gain. There is no better safeguard against infidelity of officials in that respect, yet discovered, than to require municipal contracts to be publicly let, the scope of the service to be performed and the terms of payment being so definitely mapped out in advance as to enable persons experienced in respect thereto to estimate with reasonable certainty the actual cost thereof, and to require the award to be made without change in such service or terms. A requirement of that kind forms part of the governmental system of nearly

every political organization ⁹⁴ from the nation itself down to the minor governmental agencies in towns. Obviously, to restrict the meaning of the word "work" in the law in question to the mere expenditure of physical or mental energy to some municipal end, would violate the manifest policy thereof. It is far more important to public interests to require the construction of buildings, bridges and other structures needed by municipalities to be contracted for according to the merits of competitive offers, than to require mere work to be so contracted for. The term in question, in such statutes as we have here, is commonly regarded as referring more properly to the former than to the latter, and without room for reasonable controversy. Very few instances can be found in the books where courts have been called upon to make any declaration in the matter. In *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685, "work," in a somewhat similar provision to the one under consideration, was, without discussion, treated as including the construction of a crematory. True, in the Milwaukee city charter it was coupled with the word "improvements" at one point, but at others it was used as inclusive thereof. In the directions for letting the contract it was used alone, manifestly as covering buildings, bridges, and all structures required by the municipality. In *State v. Barlow*, 48 Mo. 17, *Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693, *American Pavement Co. v. Wagner*, 139 Pa. St. 623, 21 Atl. 160, and many other cases that might be referred to, such word in similar laws is spoken of as synonymous with works, structures of some kind. In the charter of respondent it obviously includes that meaning.

In addition to what has been stated as to the manner in which public work is required to be contracted for under the charter of respondent city, there is the following in the section before referred to: "All bids and proposals shall be sealed and directed to the common council, and shall be accompanied with a bond to the ⁹⁵ city in a penal sum equal to the amount of the bid, which bond shall be signed by the bidder and by a responsible surety, who shall justify that he is worth the sum mentioned in such bond over and above all debts, liabilities and exemptions; such bond shall be conditioned that such bidder will execute a contract at such time as the common council shall require, with satisfactory sureties, to perform the work specified."

Power to make the contracts in question at all was dependent upon a substantial compliance with all the quoted provi-

sions: *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685. If they were made in any other way, they constituted no warrant for the disbursement of public money for the structure obtained thereby, nor did the furnishing thereof, whether in good faith or bad faith, or whether the city in fact obtained a good bargain or not, of itself constitute a defense to this taxpayer's action to prevent payment of public money to the respondent bridge company and Business Men's League; nor can such furnishing prevent the rendition of a judgment against them and the officers who participated in transferring possession of the money illegally from the city treasury to them for a restoration thereof to such treasury: *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798; *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685; *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430; *City Imp. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776; *McCloud v. Columbus*, 54 Ohio St. 439, 44 N. E. 95; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *McDermott v. Jersey City*, 56 N. J. L. 273, 28 Atl. 424; *Brady v. New York*, 20 N. Y. 312; *Board v. Ellis*, 59 N. Y. 620; *McDonald v. Mayor*, 68 N. Y. 23, 23 Am. Rep. 144; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *East River G. L. Co. v. Donnelly*, 93 N. Y. 557; *Lyddy v. Long Island*, 104 N. Y. 218, 10 N. E. 155; *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Wickwire v. Elkhart*, 144 Ind. 305, 43 N. E. 216; *Platter v. Board etc.*, 103 Ind. 360, 2 N. E. 544.

The rule of the New York cases above cited was approved in *Wells v. Burnham*, 20 Wis. 112. True, there is a conflict⁹⁶ of authorities as to the responsibility of a municipality to pay for property obtained through an invalid contract and of the recipients of money thereon to restore the same, some holding that a contract, though not in all essentials made according to law, if within the power of the municipality, and fairly made, except for the departure from established procedure, cannot be impeached after the performance thereof and acceptance of the work, and some holding, in the circumstances stated, that though no recovery can be had upon the contract, there may be quantum meruit. However, the general rule is that a municipality is without authority to make a contract having any vitality whatever otherwise than for the objects and in the manner prescribed by law, and that one in form entered into in any other manner than substantially that provided by law, where the provisions in that regard are coupled with a

prohibition to otherwise contract; imposes no liability on the municipality even though it is performed by the opposite party. In *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4, it was held that a contract thus prohibited is fundamentally illegal; that the common council of a city has no jurisdiction to audit and allow a claim thereunder or to recognize it as having any vitality whatever.

The plea of ratification of a contract made in violation of a charter provision such as the one under discussion is of no avail unless the acts relied upon for ratification would be sufficient to support a contract as an original matter: *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Tiedeman on Municipal Corporations*, sec. 170; 1 *Beach on Public Corporations*, sec. 251; *Caxton v. School Dist.*, 120 Wis. 374, 98 N. W. 231. So it follows that, if the manner the respondent city was required by its charter to contract for the bridge was not substantially followed, no liability to pay therefor was incurred, the disbursement of public money on account of the same was illegal, and the fact that the desired bridge was secured by the municipality cannot affect⁸⁷ the result of this action as to it or the respondent Business Men's League, or bridge company.

Before testing the finding of the court by the evidence, as to whether the charter requisites to the validity of the contract were complied with, we will endeavor to state clearly what those requisites were. First in order is the one requiring the work to be let to the lowest reasonable and responsible bidder. The charter contains no express direction as to the manner of calling for bids or giving the necessary information to enable persons desiring to enter the competition to do so intelligently, each having in mind the same character of work and terms. Many charters contain such express direction. In such circumstances it has been uniformly held that failure to call for bids in the prescribed way or to provide plans and specifications for the work within the convenient reach of bidders, is fatal to the proceeding: *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685; *State v. Barlow*, 48 Mo. 17. When the manner prescribed for letting public contracts includes the element of competition between rival bidders and cannot be executed in spirit without reasonably definite plans and specifications for the proposed work being provided for the use of bidders and a notice being given of the facts in some way reasonably calculated to attract the attention of all persons liable to desire to enter the competi-

tion if given an opportunity to do so, then such requirements should be regarded as a part of the law by necessary implication. In *Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693, it was held that a requirement for public work to be let to the "lowest bidder necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done and materials to be furnished, etc., specifications freely accessible to all who may desire to compete for the contract and upon which alone their respective bids^{us} must be based." We indorse that. This court in effect so held in *Kneeland v. Milwaukee*, 18 Wis. 411, and *Kneeland v. Furlong*, 20 Wis. 441. In the latter case the placing of proper plans and specifications within the convenient reach of bidders so as to enable them to act intelligently in respect to the proposed work, each making an offer to produce the particular desired result, was held to be a matter of the highest importance. "The want of proper and certain information," said the court, "must always tend to discourage bidders and prevent fair competition." Otherwise a law merely requiring public work to be let to the lowest reasonable and responsible bidder would be ineffective. Such a law clearly, by implication, contains substantially what was expressed in the charter, compliance with which was deemed to be vital to the contract in *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685. As there held, such a provision contemplates that "the bidders shall start on a common ground and bid for the production or accomplishment of the same identical result." In harmony with that, we hold that the charter in question required, as an essential to the validity of the contracts for the bridge, the preparation of proper plans and specifications for those parts of the bridge proposed to be let separately, the placing thereof within convenient reach of all desiring to consult the same for the purpose of bidding for the work, and the giving of public notice in some way reasonably appropriate to reach all persons likely to desire to participate in the competition.

A second essential contained in the charter is that the plans and specifications and terms, submitted as a basis for the bids, shall not be changed except in such manner as to affect all bidders and persons desiring to bid alike; that in case of a substantial change, either in the character of the structure or the terms of the proposed contract after the first competition shall have been completed, there shall be a second opportunity

given to bid upon the new basis: *Wells v. Burnham*, ⁹⁹ 20 Wis. 112; *McDermott v. Jersey City*, 56 N. J. L. 273, 28 Atl. 424. To permit one person to change his offer in consideration of a variation in the plans and specifications or proposed terms, and to award to him the contract as a result thereof, is the plainest kind of a violation of such a law as the one in question. An award made to a particular bidder through negotiations with him, the work to be done or the terms of the contract being privately varied upon the one side to secure a reduction in the offer to do the work upon the other, is not a letting to the lowest bidder upon an open competition. On the contrary, it is an award of work privately made upon special terms to produce something not submitted to public competition: *Shaw v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *Tiedeman on Municipal Corporations*, sec. 173.

A provision for public contracts to be let to the lowest reasonable and responsible bidder, executed reserving power to reject any and all bids, requires the governing board to take up the bids for the work and consider them judicially. It does not permit arbitrary rejection of bids, nor arbitrary preference of one bid over another which is lower. Having determined, in the manner indicated, which of the several bids is the lowest and most reasonable of those made by responsible parties to do the thing proposed in the manner and upon the terms specified, and that there is no good reason for rejecting all bids and throwing the matter open to a second competition, the governing body should award the contract: *Beach on Public Corporations*, sec. 698. The law permits no private negotiations with an individual bidder, no change of plans and specifications submitted for the competition, no variances for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality as any proceeding requiring the exercise of quasi judicial authority. Municipal officers, in the execution of such a law, must necessarily exercise the judicial function to a certain extent, acting ¹⁰⁰ between the corporation and the bidders, and between bidders.

A third essential of the charter is that all bids shall be sent to the city council under seal. That implies that the bids are to be opened in the presence of the council, and all so treated at the same time and when they are taken up for consideration, thus in a measure precluding publicity as to the con-

tents of the respective bids and opportunity for collusion between bidders, and negotiations between members of the council and bidders.

A fourth essential of the charter is that each bid shall be accompanied with a bond as before indicated.

In the light of what has been said and the evidence found in the record, we are at a loss to understand upon what theory it could have been held that the charter of the respondent city was substantially complied with in the making of the contracts in question. Appellant's counsel insist, upon good grounds, that the finding is not supported by the law or the evidence. It seems probable that the true basis thereof is disclosed in the idea expressed in connection therewith, that in awarding the contract the council proceeded in the manner best calculated to secure competition in bidding, and in the customary manner of letting contracts for such work to the lowest reasonable and responsible bidder. That is, as we take it, that ordinarily in letting public work to the lowest reasonable and responsible bidder, the right to reject any and all bids being reserved, after some basis of actual cost has been obtained by the submission of numerous bids, private negotiations are resorted to for the purpose of making the best possible bargain, and that in such negotiations it is customary to give and take, each side striving by minor concessions to obtain major advantages. That may be true as regards private contracts, though it is doubtful; but manifestly, no such proceedings can be justified as regards public contracts where the law specifically directs the steps to be taken. The circuit ¹⁰¹ court must have used the term "substantial compliance" with reference to the actual results obtained instead of the essential steps required by the charter in the making of such contracts, the idea being that the purpose of such steps is to obtain the best results practicable for the corporation, and that, if such results were in fact obtained, then the charter was substantially complied with. If so, a mistake of law was very clearly committed. It may be that, in the particular case, the methods adopted by the city officers to procure the bridge were advantageous to the public; but that does not help the matter. The charter having prescribed how such contracts must be made, having mapped out, expressly or by implication, a particular plan to be followed in order to prevent dickering, which, if allowed to be resorted to in such matters, is liable to result in favoritism, extravagance, or corruption, the municipal officers were under an absolute disability to proceed in any other way.

So, while it may be true that in the particular case before us the best results obtainable were secured, and if that were to be taken as warranting the finding of substantial compliance, it could be sustained, manifestly, it is not the test, nor a circumstance that counts in a contest of this kind. There is no such thing known to the law as substantial compliance with the prescribed method for making public contracts, other than performance, in substance, of every condition precedent to such making, regardless of whether the results finally obtained could have been reached in the particular instance in a more economical manner or not.

The evidence is undisputed that the draw span of the bridge, a very material part, was obtained by private contract in violation of the express prohibition in the charter; that the substructure was obtained in substantially the same way; that the only invitation for bids on the superstructure was by letters addressed by the mayor to several bridge companies; that there was no general invitation or opportunity given to men ¹⁰² engaged in the business of constructing bridges to bid on the work; that the letter sent to the few favored bridge companies did not confine the bidders to a competition to produce the same particular result; that each was permitted to vary the details of the work to suit his own notions and convenience; that the charter requirement as to all bids being directed to the common council under seal and accompanied by a bond was entirely omitted from the invitation, and from the offers made by bidders; that there was no adjudication by the council upon bids submitted, as the charter requires; that the contract made did not accord with any bid submitted, formally, or with the invitation for bids; and that it was made as the result of negotiations between the city officers and the bridge company, the price of the work and the terms of payment being materially changed from what other bidders had the opportunity of considering. A more flagrant disregard of the provisions of a city charter in respect to such matters it would be hard to find in any of the large number of cases reported in the books touching such question. That the contracts were utterly void and furnished no justification for turning over public money to the respondent bridge company and the respondent members of the Business Men's League, is too manifest to require further discussion.

In view of the foregoing, some assignments of error presented for consideration do not require attention, but we will

notice such others, briefly, as seem upon any aspect of the case to be material.

The only proof that bids delivered to the mayor in response to his communications to the few bridge concerns favored by him with permission to participate in the competition, so called were placed before the common council and the respective merits thereof passed upon by it, the respondent bridge company receiving the award, was parol evidence of proceedings of a meeting of such council held December 21, 1901. The record of the previous meeting showed that it was ¹⁰³ adjourned to December 23d following. Such evidence was to the effect that the adjournment was to the 21st. The city clerk testified in harmony with the record. The evidence was admitted against objection by appellant's counsel.

The authorities are not in harmony as regards whether evidence aliunde the official record is permissible to show proceedings of a public governing body, where the law requires such a record to be kept. The rule here is that such evidence is not admissible where the effect thereof will be to vary or contradict the record, but may otherwise be received for the purpose of showing occurrences which, through oversight or some other cause, were not recorded: *Duluth etc. R. Co. v. Douglas Co.*, 103 Wis. 75, 78, 79 N. W. 34; *Bartlett v. Eau Claire Co.*, 112 Wis. 237, 68 N. W. 61; *Nehrling v. Herold Co.*, 112 Wis. 558, 68 N. W. 614. That is fraught with so much danger that the rule should be administered with caution, the alleged unrecorded proceeding not being held established without clear evidence thereof. The presumption is, where no record of proceedings of a public body exists, that none took place. When that is supported by the unequivocal, reasonable evidence of the person who should have made the record if there was any occasion therefor, it is doubtful whether evidence from several interested persons should be held sufficient to establish the contrary.

As the record of the trial stands it contains no competent evidence that the bids received were considered by the common council and an adjudication respecting the relative merits thereof made. Since the official record of the proceedings of the common council is to the effect that the meeting of December 17, 1901, was adjourned to December 23d thereafter, the evidence that the adjournment was in fact to December 21st and that a meeting was held pursuant thereto, contradicts the record, hence was improperly received. If it be a

fact that the adjournment was to December 21st, and that proceedings then occurred as claimed, there was but one of ¹⁰⁴ two ways to proceed in order to make competent evidence thereof: First, have the clerk amend the record, if he would. He had ample authority to do so of his own motion before approval of the defective record by the council, and, by very respectable authority, thereafter. In any event it was competent for him, by direction of the council, to correct the record in conformity to the facts at any time. Second, if the clerk refused to amend his record, coerce him to do so by mandamus proceedings: *Halleck v. Boylston*, 117 Mass. 469; *Mott v. Reynolds*, 27 Vt. 206, 208; *Boston T. Co. v. Pomfret*, 20 Conn. 590; *State v. Jersey City*, 30 N. J. L. 93; *Beach on Public Corporations*, sec. 1300; *Dillon on Municipal Corporations*, secs. 295-297.

Upon its appearing on the trial that the contract made with respondent bridge company was materially different from its bid, made in response to the mayor's communication as aforesaid, and different from the terms contained in such communication, and that some four thousand dollars had been paid to the bridge company, application was made for leave to amend the complaint setting up those facts. Objection was made thereto on behalf of the bridge company that the amendment was unnecessary, and on the part of other defendants that they were unprepared to meet the new matter. If it were necessary to so amend the complaint in order that the matter mentioned might be considered in the final disposition of the case, we see no reason why the application in that regard should not have been granted. It was an appeal to the sound discretion of the court; but since there was no reason whatever for holding appellant guilty of laches in not bringing the additional facts to the attention of the court by the pleading earlier, and it was perfectly apparent that such facts had some bearing upon the responsibility of the persons charged, the amendment should not have been unqualifiedly refused. All the evidence was before the court. The facts it tended to prove were established beyond room for reasonable controversy. The evidence given was not disputed, neither does it seem there was ¹⁰⁵ any room to dispute it. It is manifest that, if the defendants other than the bridge company, who only objected to the amendment as unnecessary, were not prepared to defend against the new elements, it was not for want of time to make investigation in respect thereto. Whatever there was concerning the same, such

defendants must have been perfectly familiar with and had the evidence at hand. In fact, as before indicated, it seems that all there was in regard to the matter was fully disclosed, and the only burden the amendment would have placed upon the defendants, if any, was to compel them to meet the legal aspect of the case in the light of the additional element. The application for leave to amend was of the character frequently made, and generally granted, as such applications ought to be in furtherance of justice.

The learned trial court found that the parties concerned in making the contracts in question acted in the utmost good faith. In one aspect of the matter that is probably correct. The officers doubtless had no other motive than to secure for their city a bridge as cheaply as possible. In that sense a public officer may act in good faith and yet be a willful lawbreaker and guilty of a fraudulent appropriation of the people's money. If such officers, knowingly or willfully use such money contrary to law, but otherwise to accomplish a legitimate municipal purpose in a legal sense, they are guilty of acting in bad faith, and of an actionable misappropriation of such money regardless of their good intentions. It will not do to allow such officers to escape responsibility in such cases because, though they broke the law, they acted in good faith. The law does not permit that; yet such species of good faith is one of the most common defenses insisted upon in cases of this kind. In view of the evidence showing that the money obtained to procure the bridge was taken from the public treasury, put into private hands, and shifted about to the end that it might be thereby removed beyond the control of the court in the taxpayer's suit to prevent its being legally paid ¹⁰⁶ out, it is quite evident that the parties concerned were apprehensive that their proceedings would not successfully bear the test of judicial investigation. Their conduct strongly tends to show a willingness at least to disregard the charter restrictions upon their conduct, so far as such restrictions interfered with their own notions of how to obtain the bridge to the best advantage. That, properly speaking, was bad faith, however free the parties were from any conscious purpose to break the law. It is far too frequent that officers of minor public corporations attempt to justify infidelity to the duties of their positions by the plea that the way they chose to accomplish legitimate ends was better than the one provided by law, so that there was no real loss to the public. Such attempts are generally, and of course must necessarily be, futile: *Mueller v.*

Eau Claire Co., 108 Wis. 304, 84 N. W. 430; Frederick v. Douglas Co., 96 Wis. 411, 71 N. W. 798; Northern T. Co. v. Snyder, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460.

In support of the judgment counsel for respondents rely in a measure upon the finding that prior to the trial of the action the defendants composing the Business Men's League had completed their contract and received the agreed amount for their work, and that the American Bridge Company had incurred considerable expense in the performance of its contract. We do not perceive how what was done by the parties after the commencement of the action, whereby they will suffer loss if appellant succeeds, should have any weight in the matter. Certainly, they took their chances, in proceeding after being admonished by the commencement of the suit that the validity of their contracts would be judicially investigated. Sometimes laches on the part of a taxpayer in commencing an action of this sort materially affects the quantum or character of the relief which equity will afford him, as was the case in Frederick v. Douglas Co., 96 Wis. 411, 71 N. W. 798; but the action having been seasonably commenced for all purposes, the ¹⁰⁷ defendants cannot, as a rule, reasonably expect to obtain any great or lasting advantage by accomplishing in the interim between such commencement and the final adjudication of the rights of the parties the thing sought to be prevented. They may proceed, there being no provisional remedy to prevent it, so as to preclude preventive relief of an effective character at the close of the litigation, laying themselves liable, however, to restore the public money obtained by them, and to recoup their loss, so far as practicable, by such lawful means as may be open to them.

Lastly, the court found appellant not to be worthy of recognition in equity to redress the wrong complained of, because, though it was a taxpayer and a proper party as such under ordinary conditions to invoke equity jurisdiction to the end sought, it was the owner of a toll bridge the value of which was imperiled by the work sought to be prevented, and it had opposed the building of such new bridge and the litigation was a continuation of such opposition, which fact so soiled its hands that equity could not properly listen to its appeal. True, the evidence shows that appellant, for some time before the commencement of the litigation, was engaged in opposing the building of a second bridge. But there seems to be nothing in that which can be legitimately said to have rendered it an outlaw as to the use of equity jurisdiction to redress the public wrong affecting

its private interests. There is nothing in the evidence indicating that its opposition to the building of the new bridge was wrongful or that it acted unfairly as regards placing its bridge at the disposal of the city for such use as could be made of it. Its attitude seems to have been, so far as the evidence shows, one of honorable opposition to the new structure. That being the case, we cannot see why it should not have the same right to the use of equity jurisdiction to prevent the misuse of public money upon an illegal contract for a second bridge as if its private interests were less. It is the private interest of the taxpayer, ~~the~~ after all, that enables him to set judicial machinery in motion in a suit of this sort. However much the public may be interested, no individual can be permitted to vindicate its right unless he has a personal interest in the matter. If he has such interest he may do so, though such interest be very small. As said in *Mueller v. Eau Claire Co.*, 108 Wis. 304, 84 N. W. 430, in a suit of this kind the court will not stop to inquire respecting plaintiff's standing further than to determine whether he is a taxpayer. That gives him sufficient interest in preventing the misuse of public money to entitle him to be heard in that regard even though it be true that the personal loss to him, in the event of no remedy being applied, would be infinitesimal. So far as anything we can discover in the record goes, plaintiff had a full taxpayer's right to the remedy sought, and asserted it. That was the primary purpose of the litigation. The fact that there was a secondary purpose in view to protect its purely private interest, which was so large that the contemplation of it quite overshadows its interest as a taxpayer, is no justification for denying it the usual taxpayer's remedy, so long as there was nothing reprehensible in such secondary purpose, as there certainly was not. It was perfectly natural for plaintiff to oppose the building of the new bridge. It had a perfect right to do so. In exercising that right by all honorable means it gave no ground whatever for shutting the doors of equity to it as regards vindicating its right as a taxpayer. In that view we can find no support in the record for the finding that this suit was brought for no other purpose than to promote appellant's purely private interest as owner of a bridge the value of which was threatened by the building of the new one.

It seems that nothing further need be said in this case. It is like many cases that have come to this court in recent years where it has been uniformly held that parties illegally obtain-

ing public money, and officers who are guilty participants in the matter, are liable at the suit of a taxpayer for the ¹⁰⁹ restoration thereof to the proper custodian of the same. The unfaithful officers who may be the instruments in taking the money from where it belonged and placing the same where it does not belong are just as liable as the persons who are enriched by the transaction. It is only by making the former liable, with or without being joined with the latter, that the public treasury can be efficiently guarded. It is useless to merely hold the persons liable who obtain the money. They, generally speaking, are the ones that should receive the favorable consideration of a court of equity if anyone. They commonly part with value for the money received, as in this case, and usually, also, rely upon the officers to proceed legally. Above all, the officers are the trustees chosen to conserve the people's interests, and, having accepted the trust, they should be held to strict accountability.

In this case we see no escaping the conclusion that the money paid to the respondent bridge company and members of the Business Men's League was paid upon absolutely void contracts. As said, in effect, by Earl, J., in *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4, the contracts were so utterly void that it was not within the power of the common council of the city to give any validity to them whatever by any recognition on their part thereof as legal. That being so, judgment for a restoration of the money paid should be rendered as in *Webster v. Douglas Co.*, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. 885, 78 N. W. 451, and according to the rule announced in *Egaard v. Dahlke*, 109 Wis. 366, 85 N. W. 369, and similar cases.

By the Court. The judgment is reversed, and the cause remanded with directions to render judgment in favor of the respondent city of Durand against the respondent American Bridge Company and J. J. Morgan for the money paid to such company upon its illegal contract mentioned in the opinion, with interest thereon from the time of such payment; and to render judgment in favor of said respondent city of ¹¹⁰ Durand against the defendant members of the Business Men's League and J. J. Morgan for the money paid such members upon their illegal contract mentioned in the opinion, with interest thereon from the time of such payment; and to render judgment in favor of the plaintiff and against said respondents, American Bridge Company, the members of said Business Men's League, and J. J. Morgan, for its costs and disbursements in the action as the

same may be taxed and allowed according to law. Further testimony may be taken if necessary to enable the court to determine the precise amount of money paid the American Bridge Company and the times of the various payments, in order to properly determine the matter of interest.

The Letting of Public Contracts to the lowest responsible bidder is discussed in the monographic note to *State v. Rickards*, 30 Am. St. Rep. 489-497. A provision in a city charter that certain contracts shall be let to the lowest responsible bidder is mandatory, and a compliance therewith is essential to the validity of such contracts: *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20. Letting by contract to the lowest bidder necessarily implies equal opportunities to, and freedom in, all whose interests or inclinations may impel them to compete at the bidding: *State v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386. The determination of who is the lowest responsible bidder rests, not in the exercise of an arbitrary unlimited discretion of the officer or board awarding the contract, but upon the exercise of a bona fide judgment, based upon facts tending reasonably to support such determination: *Inge v. Board of Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20. That a bid may be rejected, although made by the lowest responsible bidder, see *Givins v. People*, 194 Ill. 150, 88 Am. St. Rep. 143.

ARENTSEN v. MORELAND.

[122 Wis. 167, 99 N. W. 790.]

VENDOR AND PURCHASER.—An Agreement to Convey Real Estate Calls for a Conveyance of the Entire Estate in the lands sold by a good and sufficient deed. (p. 955.)

VENDOR AND PURCHASER—Contract of Sale, When Includes All Timber on the Land.—An option to purchase all lands controlled by the vendor belonging to the N. W. L. Company includes both the land and the timber growing thereon, though the vendor had a right under his contract with such company to the timber only, if he had under the same contract the option to purchase the complete title under the terms therein specified. (p. 955.)

VENDOR AND PURCHASER, Damages for Failure to Convey. A vendor who agrees to convey lands which he knows at the time he had himself previously conveyed to another, or to which he has no title, is answerable in damages to the vendee for the loss of his bargain. (p. 960.)

VENDOR AND PURCHASER, Damages for Failure to Convey When Purchaser Knew the Vendor had No Title.—If a person contracts to sell and convey land to which both he and the purchaser knew he had no title, the latter may, nevertheless, on the breach of the contract, recover for the loss of his bargain. (p. 962.)

Action to recover damages alleged to have been sustained by the breach of a written contract whereby the defendants Moreland and others agreed with the plaintiff Arentsen that the former gave to the latter an option, dated July 4, 1903, for ninety days, "on all lands they now control, belonging to the North Wisconsin Lumber Company, excepting the west half of the northwest quarter of section 24, all the above lands situated in town 43, R. (8) west, Bayfield county, Wisconsin, about eighty-five hundred acres." The consideration of the option as specified in such writing was three hundred dollars, one hundred dollars of which had been paid at its execution, another hundred dollars was to be paid thirty days from its date, and the remaining hundred dollars in sixty days from such date; the purchase price of the lands to be three dollars per acre. The complaint alleged the making of the contract, the payment of the three hundred dollars within the time specified and prior to September 3, 1903; that afterward, on the 26th of the same month, the plaintiff elected to purchase the land referred to in the option, and notified the defendants thereof, and that the plaintiff was on the date last named able, ready and willing to purchase such lands on the terms described in the contract, and personally demanded of the defendants a conveyance thereof, and offered for such conveyance to pay the consideration mentioned in the option; that the defendants refused to convey and declared that they had so encumbered the lands by a contract of sale of all the saw timber that they could not convey otherwise than by a conveyance reserving such saw timber; that the land mentioned in the option was timber land and valuable chiefly on account of its standing timber; that the defendants could not, on September 26, 1903, nor since, convey a marketable title, for the reason that such lands were at all such times, and still are, encumbered by a contract of sale to Rogan Brothers of all the saw timber on seven thousand eight hundred acres of such land, which defendants had contracted to sell to Rogan Brothers for five thousand dollars, who had been granted three years from July 21, 1902, in which to remove the timber. The plaintiffs alleged their damages to be thirty-seven thousand nine hundred and twenty-six dollars.

The defendants by their answer pleaded that on July 21, 1900, they entered into a contract with the North Wisconsin Lumber Company for the purchase of the lands in question, and annexed a copy of such contract to the answer. That they had fully complied with the terms of their contract with the North Wis-

consin Lumber Company; that the contract by its terms, in consideration of five thousand dollars to be paid by defendants, warranted the title to them of all the timber on the lands described, with the privilege of entering thereon for five years to remove it; that such contract was to be closed by limitation. July 21, 1905, at which date the defendants were to have the privilege of purchasing the North Wisconsin Lumber Company's title to the lands for two dollars and a half per acre as of July 21, 1900, with interest at six per cent, and taxes. The answer admitted the making of the contract with Rogan Brothers for the sale of the timber of September 13, 1902; that at the making of the option, the plaintiff had knowledge of the defendants' contract with the North Wisconsin Lumber Company and with Rogan Brothers, respectively; that the option was intended to be an option to purchase the right, title and interest of the defendants in the lands, and no more; that at the time of making the option the defendants only controlled such lands belonging to the North Wisconsin Lumber Company as were described in the contract with it, all of which land was subject to the right of Rogan Brothers, all of which was well known to the plaintiff; and finally, that the defendants had at all times been ready and willing to convey by quitclaim deed the lands in controversy or to assign their contract to the plaintiff, subject only to the contract with Rogan Brothers.

The defendants also interposed a counterclaim alleging substantially the same facts as their answer, and that they had tendered to the plaintiff a warranty deed to the lands, subject to the contract with Rogan Brothers, which plaintiff refused to accept, and defendants demanded judgment for twenty-five thousand two hundred and sixty dollars for the breach of their contract with the plaintiff.

In his reply to the counterclaim the plaintiff admitted that at the making of the option he had knowledge of the contract with the North Wisconsin Lumber Company, but denied notice or knowledge of the contract with Rogan Brothers until long after the making of such option.

At the trial, after a jury had been impaneled and sworn, the defendants moved for a judgment on the pleadings as prayed for in their counterclaim, and thereupon the court ordered that judgment be entered on the complaint canceling and rescinding the contract between plaintiff and defendants set out therein, and that the plaintiff recover of the defendants three hundred and sixty-nine dollars and forty-nine cents as damages. Both parties appealed.

J. F. Riordan and Harold Harris, for the plaintiff.

Tomkins, Tomkins & Garvin, for the defendants.

173 CASSODAY, C. J. 1. It is conceded that the plaintiff paid the full consideration for the optional agreement, as therein prescribed. It is also conceded that, within the ninety days therein given to him within which to exercise his option, he elected to purchase the lands therein referred to, pursuant to the terms of that agreement, and so notified the defendants. By virtue of such payment and such election and notice, the optional agreement became an absolute contract, binding alike upon the plaintiff and the defendants. The first question for consideration is as to what property the defendants, by that contract, agreed to convey to the plaintiff.

174 By the terms of the contract, the defendants agreed to convey to the plaintiff "all the lands" they then controlled, "belonging to the North Wisconsin Lumber Company," and situated in the town mentioned, and being "about eight thousand five hundred acres," excepting one piece of eighty acres, described. As indicated in the foregoing statement, the defendants then held a contract from the North Wisconsin Lumber Company, whereby that company had agreed to sell to them "all the timber on the" lands therein specifically described, amounting to eight thousand five hundred and eight acres, with the privilege of entering upon the lands to remove such timber at any time before July 21, 1905, when the contract was to be closed by limitation. The plaintiff admits that he had knowledge of the existence of that contract on and prior to the time of his making the optional agreement with the defendants, July 4, 1903. It will be observed that, while the contract which the defendants held from the lumber company only gave them the right "to all the timber" on the lands therein described, their contract with the plaintiff purported to give to him the right to "all the lands" covered by the contract, being "about eight thousand five hundred acres." Of course, the agreement to sell the lands necessarily included the timber growing upon the lands: *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *Seymour v. Cushway*, 100 Wis. 590, 69 Am. St. Rep. 957, 76 N. W. 769; *Mississippi River L. Co. v. Miller*, 109 Wis. 77, 85 N. W. 193. True, the contract with the plaintiff expressly limited his option to all such lands as the defendants "now control." But it is expressly admitted in the answer "that at the time of making said agreement all the lands controlled by these defendants, be-

longing to the North Wisconsin Lumber Company, were those under and pursuant to said exhibit 'A' which the defendants had obtained from the lumber company July 21, 1900. As indicated, that contract only gave to the defendants the right to the timber upon the eight thousand five hundred and eight acres of land therein described, with the privilege of entering thereon to remove the same prior to July 21, 1905, and with ¹⁷⁵ the further privilege of five years' extension upon conditions therein named, or, in lieu of such extension, it gave to the defendants the privilege, to be exercised July 21, 1905, "of purchasing the North Wisconsin Lumber Co.'s title to the lands listed at two dollars and fifty cents per acre as of date July 21, 1900, with interest at six per cent and taxes from this date—less the payment of five thousand dollars and interest at same rate." In other words, such option gave to the defendants the right to purchase the title to the eight thousand five hundred and eight acres of lands, including the timber, as of July 21, 1900, at two dollars and fifty cents per acre, and in that event the five thousand dollars paid and to be paid for the timber was to be deducted as part of the purchase price. The answer, moreover, concedes that, nearly a year prior to the contract with the plaintiff, the defendants had sold and conveyed to the Rogan Brothers "all the saw timber" on nearly all the lands they so controlled, for which they received five thousand dollars, being the same amount which the defendants were to pay for all the timber on all of such lands. The defendants refused to convey to the plaintiff, except subject to the contract with Rogan Brothers, and the plaintiff refused to accept such a conveyance.

The construction which the defendants insist shall be put upon their contract with the plaintiff is that the plaintiff is bound to accept a conveyance of the eight thousand five hundred acres of lands mentioned in his contract, without the timber, and pay therefor three dollars per acre; that is to say, upward of four thousand dollars more than the defendants were to pay for the lands with the timber, making a difference on the value of the two contracts of more than nine thousand dollars. The agreement was to convey the lands mentioned, being "about eight thousand five hundred acres." This court has repeatedly held that an agreement, in general terms, to convey real estate, calls for a conveyance of the entire estate in the lands sold, by a good and sufficient deed: *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303; *Wright v. Young*, 6 Wis. 127, 70 Am. Dec. 453; *Bateman v. Johnson*, 10 Wis. 1, 3; *Falkner v. Guild*, 10 Wis. 563; *Taft v.*

Kessel, 16 Wis. 273. The contract in question does not seem to be ambiguous, ¹⁷⁶ especially in view of the admissions of the parties, as to the condition of the title. It called for a conveyance of the title to "about eight thousand five hundred acres" of land, including the timber thereon. The contract was not complied with by the tender of a conveyance of the slight interest the defendants retained after they had conveyed nearly all the timber they had purchased of the lumber company to the Rogan Brothers. We must hold that by refusing to make such a conveyance the defendants breached the contract.

2. The important question presented is as to the measure of damages, if any, in consequence of such breach. At the commencement of the trial the defendants moved for judgment on the pleadings, and thereupon the court ordered and adjudged that the plaintiff's contract with the defendants be canceled and rescinded, and that the plaintiff recover back from the defendants, as damages, what he had paid, with interest. It was held at an early day in England that where a person contracted for the purchase of real estate, and the title proved bad, and the vendor, without fraud, was incapable of making a good title, the vendee could only recover back what he had paid, with interest and costs, but nothing for the loss of his bargain: *Flureau v. Thornhill*, 2 W. Black. 1078. In a much later case, a man, who had not obtained a conveyance, put up the lots for sale at auction, and engaged to make a good title to the purchaser by a certain day, which he was unable to do; and it was held that a purchaser of the lots at auction might recover from the vendor not only the expenses which he had incurred, but also damages for the loss of his bargain: *Hopkins v. Grazebrook*, 6 Barn. & C. 31. In a still later case, where the breach of the contract arose, not from the inability of the vendors to make a good title, but from their refusal to take the necessary steps to give the vendee possession pursuant to their contract, the vendee could recover not only the money paid and expenses, "but also damages for the loss of his bargain, and that the measure of damages was the profit which it was shown he could have had on ¹⁷⁷ a resale": *Engel v. Fitch*, L. R. 3 Q. B. 314; S. C., affirmed in the exchequer chamber, L. R. 4 Q. B. 659. The cases cited were reviewed and distinguished at great length in *Bain v. Fothergill*, L. R. 7 Eng. & Ir. App. Cas. 159-213. Twenty-five years after that decision, the cases cited were reviewed and distinguished by two of the most learned English jurists of the present time, and it was held that "A purchaser of leasehold

property, which the vendor cannot assign without a license from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such license": *Day v. Singleton*, [1899] L. R. 2 Ch. D. 320.

The trend of decisions in this country is much less liberal to the vendor than in England: 2 *Sutherland on Damages*, 3d ed., sec. 579. In several jurisdictions, and notably Missouri, even good faith on the part of the vendor is not allowed to prevent the vendee from recovering damages for the loss of his bargain: 2 *Sutherland on Damages*, sec. 579, and cases there cited; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59; *Matheny v. Stewart*, 103 Mo. 73, 78, 17 S. W. 1014. In New York it was held long ago that "The rule that a vendor who contracts to sell and convey real property in good faith, believing he has a good title, and, on discovering it to be defective, for that reason refuses or is unable to fulfill his contract, is, in an action against him by the vendee for the breach, liable for only nominal damages, should not be in any degree extended, but strictly limited to those cases coming wholly and exactly within it. And where a vendor contracts to sell lands, in which he knows at the time he has not title or the power of conveyance, he is bound to make good to the vendee the loss of the bargain through his default. Nor in such case does it excuse the vendor that he acted in good faith and believed when he entered into the contract that he should be able to procure a good title for his purchaser": *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463.

¹⁷⁸ The late Chief Justice Cooley, after reviewing the English and American cases in his terse manner, concludes that "The principle underlying these cases is that if a party enters into a contract to sell, knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by *Flureau v. Thornhill* [2 W. Black. 1078] does not apply. So if a person undertakes that a third party shall convey, and is unable to fulfill his contract, the authorities are that he shall pay full damages. Such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into. . . . There are also numerous cases which decide that if the vendor acts in bad faith—as if, having title, he refuses to convey or disables himself from conveying—the proper measure of damages is the value of the land at the time of the breach, the rule in such case being the same in relation to real as to personal property. . . . And the cases

before referred to, in which a party undertook to sell that which he did not own and knew he could not control, may also, when the other party is not informed of the defect, be considered as involving a degree of bad faith, and have generally been so regarded by the courts": *Hammond v. Hannin*, 21 Mich. 374, 386, 387, 4 Am. Rep. 490.

So it has been held in Ohio that when a vendor has title and refuses to convey, or when he disables himself from conveying by parting with his title, the rule of damages is the value when the conveyance ought to have been made: *Dustin v. Newcomer*, 8 Ohio, 49. To the same effect, *Warren v. Chandler*, 98 Iowa, 237, 243, 67 N. W. 242; *Plummer v. Rigdon*, 78 Ill. 222, 29 Am. Rep. 261; *Tracy v. Gunn*, 29 Kan. 508. But it is unnecessary to multiply adjudications, of which there is a great variety. In a standard text-book it is said: "While the general rule that the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled, is recognized, it is relaxed in some jurisdictions, and an exception admitted in favor of the vendor who makes a contract to sell and convey in good faith, believing himself to be ¹⁷⁹ the owner of the property, when he is afterward incapable of performing by reason of a defect in his title of which he was not aware": 2 *Sutherland on Damages*, 3d ed., sec. 578.

And again, leaving out what is inapplicable here: "If the person selling is in default—if he knew or should have known that he could not comply with his undertaking; . . . if he has only a contract of the owner to convey, or a bond for a deed; . . . if he makes his contract without title, in the expectation of subsequently being able to acquire it, and is unable to fulfill by reason of causes so known, as the want of concurrence of other persons, or if he has title and refuses to convey or disables himself from doing so by conveyance to another person—in all such cases he is beyond the reach of the principle of *Flureau v. Thornhill*, 2 W. Black. 1078, and is liable to full compensatory damages, including those for the loss of the bargain": 2 *Sutherland on Damages*, 3d ed., sec. 581.

Speaking of the rule of the early English case cited, another recent text-writer says: "This rule, whenever it has been invoked as a rule, has never been favorably regarded by the courts, and seems to have been productive of a great diversity of opinion as to the grounds upon which it is based. It has been rejected

by the supreme court of the United States, and is not recognized in many of the state courts, while in states where it obtains it is strictly limited to those cases coming wholly and exactly within it. But where the vendor contracts to sell lands which he knows at the time he has not the power to convey, he must abide by his contract and should be held to make good to the vendee any loss he may sustain by reason of its violation. Nor is it any excuse for the vendor, in such a case, that he may have acted in good faith and fully believed when he entered into the contract that he should be able to procure an acceptable title for his purchaser": 2 Warvelle on Vendors, 2d ed., sec. 936.

It was held in this state at an early day that the rule of damages against the vendors who had put it out of their power to convey would be the difference in the value of the land at the time the conveyance should have been made and ¹⁸⁰ the sum agreed to be paid for the land, if such value should be greater than the price fixed in the contract: *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57. That rule was followed in a more recent case where the vendor refused to give possession of the land as agreed, and wholly failed to perform the contract on his part: *Muenchow v. Roberts*, 77 Wis. 520, 522, 46 N. W. 802, 803. Mr. Justice Lyon there, speaking for the court, said: "The plaintiff is entitled to recover, if at all, the value of his bargain. The true measure of such value is the value of the land the defendant contracted to sell to him, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor. This is the general rule in this state in an action by a purchaser to recover damages for the breach of an executory contract to sell either real or personal property, where no part of the consideration has been paid."

That case seems to be in harmony with a prior case in which it was held that "One who executes a lease of a store, knowing that he cannot put the lessee in possession because another is in possession under a valid prior lease executed by himself and not yet expired, is liable to the second lessee for the whole loss proximately sustained by reason of the failure to put him in possession": *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 35.

The opinion of the court in that case refers to the early English case cited as being "somewhat limited by later adjudications," and finally concludes with a lengthy quotation from *Sutherland on Damages*, substantially the same as quoted above, and then says: "This quotation doubtless contains a correct

statement of the law acted upon in all the states, as well in those which have adopted the rule in *Flureau v. Thornhill* [2 W. Black. 1078], as in those which have not": *Poposkey v. Mankwitz*, 68 Wis. 327-329, 60 Am. Rep. 858, 32 N. W. 35.

The ruling of this court in a very recent case is quite similar: *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952, 955.

¹⁸¹ In the case at bar it is admitted in the pleadings that, at the time the plaintiff made his contract with the defendants, they never had any title to any of the lands they therein agreed to convey to the plaintiff, except the timber and the right to remove the same from the lands, and they had previously conveyed nearly all of such timber to the Rogan Brothers. They had secured to themselves the privilege of acquiring the title which they proposed to convey to the plaintiff, without the timber, at an advance of over four thousand dollars more than they were to pay for the land with the timber. The defendants expressly refused to convey the timber, and claim that they were not bound to do so by the terms of the contract. The authorities are to the effect that a vendor who has agreed to convey land which he knew at the time he had himself previously conveyed to another, or to which he had no title, is answerable in damages to his vendee for the loss of his bargain. In addition to the authorities cited above, see *Pinkston v. Huie*, 9 Ala. 252; *Gale v. Dean*, 20 Ill. 380; *Clagett v. Easterday*, 42 Md. 617; *Bryant v. Hambrick*, 9 Ga. 133; *Martin v. Wright*, 21 Ga. 504; *Irwin v. Askew*, 74 Ga. 581; *Chartier v. Marshall*, 56 N. H. 478. In some of these cases the vendor seems to have acted in good faith, but was nevertheless held liable in damages for the loss of the vendee's bargain.

In the case at bar the answer alleges that at the time of making the agreement with the plaintiff, and for some time prior thereto, the plaintiff had full notice and knowledge of the contract of the defendants with the Rogan Brothers, and of the rights of all parties thereunder. Such notice and knowledge are denied and put in issue by the plaintiff. That issue remains undetermined. If upon the trial the defendants shall fail to establish their claim that the plaintiff, at the time he so entered into the contract with them, had such notice and knowledge of their prior contract with the Rogan Brothers, then, obviously, under the authorities cited, they acted ¹⁸² in bad faith and would be liable in damages to the plaintiff for the loss of his bargain. If, on the contrary, it should ap-

pear that at the time of contracting with the defendants the plaintiff had such notice and knowledge, then, obviously, there was no fraud or deceit practiced upon the plaintiff in procuring the contract. The question recurs whether such knowledge of the plaintiff would deprive him of damages for the loss of his bargain. There are undoubtedly cases where the defect in the title is known to the vendee as well as the vendor, and where, in consequence of such knowledge, the vendor has been held to be relieved from responding in damages for the loss of the vendee's bargain. It was so held in Pennsylvania, where the fact was well known to both parties that the vendor had nothing but a life estate: *Rohr v. Kindt*, 3 Watts & S. 563, 565, 39 Am. Dec. 53. In that case, however, the court held that, by the contract upon which the action was based, "the defendant bound herself to give the plaintiff a clear deed for the ten acres which she held under the will" there in question, and that both parties must have understood that the agreement of the vendor was only to convey her life estate. Seven years afterward, in an action for the breach of an agreement to make and deliver "a good and sufficient deed, clear of encumbrances," the same court, unanimously, in an opinion written by the same justice, said: "It is scarcely an open question that upon the refusal or inability of a vendor to execute a deed clear of all encumbrances, including the wife's dower, the vendee has a right of action to recover at least nominal, or, as the case may be, compensatory, damages. Nor will it alter the case that the contingent right of dower was known to the vendee when he bargained for the land, and that, as here, he covenanted to pay her (\$5) for signing the deed. This cannot as has been contended, have the effect of making him take the risk on himself. Nor does it excuse the vendor so far as the right of action is involved, that he was willing and offered to comply with his covenant, and to make title as far as he was able without his wife's consent. The defendant covenants to make¹⁸³ the title free from all encumbrances, and this covenant is immediately broken on the refusal of the wife, from whatever cause, to become a party to the conveyance. Damages may be recovered for the loss sustained by reason of his failure to comply, arise from what cause it may, even though he may have failed bona fide and is unable to complete his contract on account of the default of another. And it is no excuse that his inability may have arisen from the refusal of the wife to sign the deed, although it may inevitably affect her interests.

Courts of law can afford no more protection to wives than from the violation of other agreements. It would be attended with the most pernicious consequences if the doctrine should receive the sanction of the court that the refusal of the wife would free the husband from all damages arising from the violation of his covenant": *Bitner v. Brough*, 11 Pa. St. 127, 136, 137.

The opinion sanctions a charge to the jury to the effect that the vendor ought not to make anything by the violation of his agreement, and that the vendee ought not to lose anything by such violation. The jury returned a verdict of one thousand dollars damages, and this was sustained on the ground that there was evidence sufficient to justify a finding of bad faith on the part of the vendor, within the early English rule stated. That case has been sanctioned by the same court in numerous adjudications since: *McDowell v. Oyer*, 21 Pa. St. 417, 426; *Meason v. Kaine*, 67 Pa. St. 126, 132; *Riesz's Appeal*, 73 Pa. St. 485, 490; *Rineer v. Collins*, 156 Pa. St. 342, 348, 27 Atl. 28. See, also, *Drake v. Baker*, 34 N. J. L. 358. According to such adjudication the mere fact that the vendee in a land contract, at the time of making the same, knew that the vendor did not have absolute title to the land, or that his title was encumbered, did not prevent him from recovering damages for the loss of his bargain by reason of the vendor's failure to convey title according to his agreement. For a much stronger reason, the vendee is not precluded from such recovery by the mere fact that at the time of making the contract he knew that the vendor had no ¹⁸⁴ title to the land whatever, or a mere optional right to acquire a title. As indicated, the authorities, both English and American, are to the effect that a vendor who agrees to convey what he at the time knows that he has no right to convey, because the title is in another, thereby assumes the risk of acquiring the title and making the conveyance, or responding in damages for the vendee's loss of the bargain. As aptly stated by Judge Cooley in the quotation from the Michigan case cited, "such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into." Such contracts for the future delivery of personal property have frequently been characterized by this and other courts as speculative in character: *Barnard v. Backhaus*, 52 Wis. 593, 598, 6 N. W. 252, 9 N. W. 595, and cases there cited. One of the definitions of "speculate" is to "take the risk of loss in view of possible gain": *Century Dictionary*.

As indicated, in the case at bar the defendants agreed to convey to the plaintiff about eight thousand five hundred acres of land, with the timber thereof, at three dollars per acre, at a time when they had no title to any of the land, nor to any of the timber thereon. To fulfill that agreement, they assumed the risk of acquiring title to the timber and the land. It may be inferred from the answer that they afterward acquired title to the land without the timber, but there is no pretense that they acquired back the timber which they had previously sold to the Rogan Brothers. In fact they insist that the plaintiff must accept a deed of the land without the timber in satisfaction of their agreement to convey the land with the timber. In other words, they insist upon violating their agreement to convey the timber to the plaintiff, which they had previously sold to the Rogan Brothers for five thousand dollars. We are not aware of any rule of law which prevents a vendee from recovering any legitimate damages he may have sustained by reason of his vendor's refusal to perform such solemn agreement. The ¹⁸⁵ plaintiff in this case had the right to rely upon the agreement of the defendants to convey the complete title to the land and timber, even if he knew at the time of making the optional agreement that they had no title to either.

By the Court. The judgment of the circuit court is reversed on the plaintiff's appeal, and the cause is remanded for further proceedings according to law. The defendants take nothing by their appeal.

Marshall and Siebecker, JJ., dissent.

MEASURE OF VENDEE'S DAMAGES ON A BREACH OF CONTRACT TO CONVEY REALTY.

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I. Scope of Note.

In our consideration of this subject, we shall not include the question what constitutes a breach of a contract to convey lands, nor shall we consider those decisions relating to actions by the vendee to recover the purchase price because of some defect in the title, nor shall we consider, except incidentally, those cases seeking to recover on contracts or bonds for deeds, in which the amount of damages to be recovered by the vendee is fixed at a stated amount and designated as either a penalty or liquidated damages. Some of the earlier decisions respecting the subject of this note were discussed in the cross-reference note to *Pumpelly v. Phelps*, 100 Am. Dec. 467, while the English decisions were exhaustively reviewed in the note to *Kirkpatrick v. Downing*, 17 Am. Rep. 687.

II. Nature of the Relation Between the Vendor and Vendee.

In *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 South. 146, it was said that the relations between a vendor and vendee of land, under an executory contract of purchase, are, in legal effect, the same as those existing between a mortgagor and mortgagee as to mutual, legal and equitable rights and remedies.

III. What Law Governs in Suits for Damages for Breach of a Contract to Convey.

Where a contract was made in one state for the purchase of land in another state, in an action for its breach brought in the state

wherein the land lays, the law of the state in which the contract was made will govern as to the damages recoverable: *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58.

IV. Presumption of Damages in Such Cases.

There is generally presumed to be some damages from the breach of a contract to sell land: *Daly v. Bruen*, 88 App. Div. 263, 84 N. Y. Supp. 971.

V. Statutory Rule for Measure of Such Damages in Some States.

Some of the states have regulated the measurement of damages for the breach of contracts to convey real property by statutory enactments. In California, section 3306 of the Civil Code provides that: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

VI. Origin, Growth and Present Status of the Rule Respecting the Measure of Damages in Such Cases.

a. *Early English Rule.*—The most famous English case on the subject of this note is that of *Flureau v. Thornhill*, 2 W. Black. 1078, which held that where the breach of the vendor to convey was caused by his inability to make a title that the vendee was not entitled to recover for his loss of his bargain where the breach of the vendor was not tainted with fraud or bad faith. That case has been the source of all the conflict of authority which appears on the subject. The various English decisions following or qualifying the rule in that case were exhaustively reviewed in the note to *Kirkpatrick v. Downing*, 17 Am. Rep. 687. The correctness of the rule announced in *Flureau v. Thornhill*, 2 W. Black. 1078, was apparently questioned by the profession in England, and a review of the rule announced in that case was had nearly a hundred years later in the case of *Bain v. Fothergill*, L. R. 7 H. L. 158, decided by the house of lords. The effect of that case was reviewed in *Gerbert v. Trustees of Congregational etc.*, 59 N. J. L. 160, 59 Am. St. Rep. 578, 35 Atl. 1121. The court said: "The exceptions ingrafted upon *Flureau v. Thornhill*, 2 W. Black. 1078, in *Pounsett v. Fuller*, 17 Com. B. 660, *Robinson v. Harmon*, 1 Wels. H. & G. 849, *Engel v. Fitch*, L. R. 3 Q. B. 314, and *Hopkins v. Grazebrook*, 6 Barn. & C. 31, all cited in *Drake v. Baker*, 34 N. J. L. 358, and there relied upon, greatly narrowed the sphere in which *Flureau v. Thornhill*, 2 W. Black. 1078, would be a controlling authority.

“Since *Drake v. Baker*, 34 N. J. L. 358, was decided, this rule has been most elaborately and exhaustively discussed and reviewed in the house of lords in England, in the case of *Bain v. Fothergill*, reported in L. R. 7 H. L. 158, and the rule in England finally settled by discarding the distinctions which had been previously ingrafted upon the case of *Flureau v. Thornhill*, 2 W. Black. 1078, in the cases relied upon in our court in *Drake v. Baker*, 34 N. J. L. 358.

“In *Bain v. Fothergill*, L. R. 7 H. L. 158, the defendants were in possession of a mining royalty under a written agreement for a lease, of which they had taken an assignment from one H. In H.’s agreement for a lease with the owners, it was stipulated that he should not assign without their permission. The defendants contracted with the plaintiff to sell their interest in the royalty, and this action was for the breach of that contract, in consequence of the inability of the defendants to make title for want of the owners’ assent to the assignment to them.

“The owners were willing to consent to the assignment to the plaintiff, if he would stipulate not to assign without their permission. One of the defendants knew that this consent was necessary, the other did not.

“The court of exchequer held the case to be within the rule in *Flureau v. Thornhill*, 2 W. Black. 1078, and gave judgment for nominal damages only. The case was carried to the house of lords and there affirmed. Three questions were propounded by the lord chancellor to the judges: 1. Whether, upon a contract for the sale of real property, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain. To this, the answer was, he is not entitled; 2. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill*, 2 W. Black. 1078. To this the answer was in the negative; 3. Whether if the rule of law is correctly laid down in *Flureau v. Thornhill*, 2 W. Black. 1078, the circumstances of the present case distinguish it, and take it out of that rule. To this the reply was also in the negative.

“The discussion in *Bain v. Fothergill*, L. R. 7 H. L. 158, is most able and interesting, and after a thorough review of all the previous English cases, the house of lords expressed the opinion that *Flureau v. Thornhill*, 2 W. Black. 1078, was established law, and that *Hopkins v. Grazebrook*, 6 Barn. & C. 31, was no longer the rule; that *Flureau v. Thornhill*, 2 W. Black. 1078, applied to every case where the vendor failed to convey through inability to make title; that the rule was the same whether the vendor had been guilty of fraud or not, for the motive of the defendant was immaterial in measuring damages for breach of contract, and that, therefore, even if there had been fraud, the vendee

could not have recovered substantial damages in contract, but must have proceeded in an action for deceit."

b. General American Rule.—Much of the confusion which exists with respect to the application of the rule for the measurement of damages in suits for a breach of the contract to convey is caused by the question whether the good or bad faith of the vendor should decrease or add to the amount of damages to be awarded. In *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107, a case which is cited frequently in this connection, the court observed: "When the action is brought, as in this case, on a contract to sell, against the vendor, who has failed to convey, we find much difficulty in determining the measure of damages upon authority. As damages are given as a compensation or satisfaction to the plaintiff for an injury received from the defendant, reason and exact justice would seem to dictate that he should not in all such cases be confined to the consideration money and interest, for frequently the interest upon the money paid is but the smallest fraction of the amount of injury actually sustained. On the other hand, quite as much injustice may result by holding that in all cases the plaintiff is entitled to the appreciated value of the land at the time the conveyance should have been made. May a rule be recognized, then, which shall have for its basis the giving of compensation for the injury, and, at the same time, avoid injury to a vendor who acts in good faith? We believe there is such a rule sustained by authority and reason, and which, while it may not in all cases make the plaintiff whole, or give him full satisfaction, will approximate it, and be as just and equitable as is consistent with most general rules. We believe that the measure of damages should depend upon the cause of the failure. If the person selling is honest, and prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. If he has paid the price, or any part thereof, then, of course, in such a case, he should recover that sum with interest.

"But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking; or having the title, refuses to convey; or having the title at the time of the agreement afterward disables himself from completing it, by a sale to a third person; or at the time of the agreement knew he had no title—in these, and in all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land at the time the contract should have been executed." The court cited numerous authorities as tending to support the rule announced. See, also, *Sweem v. Steele*, 5 Iowa, 352, to the same effect.

And in *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677, a well-considered case, the general rule was stated as follows: "If the

plaintiff had paid nothing down, and the land was worth at the date of the breach more than he was to give for it, the difference would be his profit, and he could recover that amount. If there was no difference between the contract price and the value of the land when it should have been conveyed, and nothing was paid, then his damages would be nominal only; or if, in such case, the land was worth less than the contract price, he would then have nominal damages for the technical breach. So, if the plaintiff had paid the contract price in full he could recover the value of the land at the time it should have been conveyed to him, whether the value was then more or less than the contract price. And so it logically follows, there being a part payment and the land worth less than the contract price at the time a conveyance should have been made, that the damages recoverable would be what the land was then worth, less the amount of the price for it that remained unpaid. By paying the full price, the vendee is entitled to the land or its value, whatever the value may be. The recovery of damages, according to these rules, puts him in as good condition as if the contract had been performed. He gets exact indemnity."

The plaintiff in the above case admitted the correctness of the general rule stated by the court, but contended that a different rule obtained in cases where the vendor, through unanticipated causes which he could not control, was, though acting in good faith, unable to convey. The court in denying plaintiff's contention, said: "We think the rule that we are disposed to adhere to, as adapted to all cases, a reasonable one. The pecuniary damages are the same to the vendee, whether the motive of the vendor in refusing to convey is good or bad. It is a difficult thing to ascertain whether or not a vendor is actuated by good faith in his refusal to convey. There can easily be frauds and deceits about it. The vendor is strongly tempted to avoid his agreement where there has been a rise in the value of the property. The vendee, by making this contract, may lose other opportunities of making profitable investments. The vendor knows, when he contracts, his ability to convey a title, and the vendee ordinarily does not. The vendor can provide in his contract against such a contingency as an unexpected inability to convey. He can also liquidate the damages by agreement. The measure of relief afforded by our rule is a fixed and definite thing. The other rule is not easily applied to all cases, and the books are burdened with discussions and refinements in relation to the modifications and restrictions and qualifications, which, in different jurisdictions, have been annexed to it."

Likewise, in *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59, the court in assigning its reasons for adhering to the rule that the good or bad faith of the vendor is immaterial, observed: "It is to be remembered that in this country, especially in the western states, lands

are quite as much the subject of trade as personal property. Titles for the most part are not complicated. Statute law has reduced conveyances to a great degree of simplicity. There is no good reason why one who undertakes to sell real property by a specified form of deed should not abide the terms of his contract. He can readily contract against any unexpected real or supposed defect in the title. So long as the vendee is willing to accept the deed bargained for, the vendor ought not to be relieved from paying an adequate compensation for breach of the contract. The supposed or real defect in the title, and the question of good faith or want of good faith, should not be considered. Adequate compensation requires that the vendee should be put in the same position, as near as can be done by the award of damages, that he would have been in if the contract had been executed as agreed. Where the purchase money has not been paid, the measure of damages is the difference between the contract price and the value of the property at the date of the breach."

But the question of good or bad faith is frequently made an element in the measure of damages in cases of this sort. Thus, though the rule was criticised, the court, in *Tracy v. Gunn*, 29 Kan. 508, held that where the breach is tainted with fraud or bad faith, the damages may include all the actual damages sustained by the vendee.

And it was held in New York that if the vendor acts in good faith, the contract price is the measure of damages, but if in bad faith, the vendee may recover all the damages sustained by the breach: *Baldwin v. Munn*, 2 Wend. 399, 20 Am. Dec. 627. And, in this connection, see, also, *Peters v. McKeon*, 4 Denio, 546; *Conger v. Weaver*, 20 N. Y. 140; *Cockcroft v. New York etc. R. Co.*, 69 N. Y. 201; *Northridge v. Moore*, 118 N. Y. 419, 23 N. E. 570.

In *Margraf v. Muir*, 57 N. Y. 155, the New York court said: "The general rule in this state, in the case of executory contracts for the sale of land, is that, in the case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase money, in which case he can also recover such purchase money and interest: *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Pumpelly v. Phelps*, 40 N. Y. 60, 100 Am. Dec. 463. See, also, *Lock v. Furz*, L. R. 1 C. P. 441; *Engle v. Fitch*, L. R. 3 Q. B. 314.

"But to this rule there are some exceptions, based upon the wrongful conduct of the vendor, as if he is guilty of fraud or can convey, but will not, either from perverseness, or to secure a better bargain, or if he has covenanted to convey, when he knew he had no authority to contract to convey; or, where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases the vendor is liable to the vendee for the loss of the bargain under rules analogous to

those applied in the sale of personal property." See, also, *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115. But see, also, the later cases of *Sloan v. Baird*, 162 N. Y. 332, 56 N. E. 752, and *Goodman v. Wolf*, 95 App. Div. 552, 88 N. Y. Supp. 934, where it was held that the value of the property at the time of the breach was the measure, though it was not clearly shown what was the cause of the breach.

Chief Justice Cooley in *Allen v. Atkinson*, 21 Mich. 351, very pertinently observed that: "If the vendor willfully refused to perform his contract, he must place his vendee, as near as money can do, in the same position in which he would have been if he had obtained that for which he contracted." An observation to the same effect was made in *Chartier v. Marshall*, 56 N. H. 478.

And in an earlier case in New Hampshire—that of *Moore v. Davis*, 49 N. H. 45, 6 Am. Rep. 460—it was held that in such cases all such consequential damages as are the fair, legal and natural result under all the circumstances of the breach are recoverable.

The rule in such cases is variously stated sometimes with and sometimes without modifications, but such general statements are sometimes misleading.

Thus it has been stated in a very general way that the measure of damages in such cases is the value of the land at the time when the conveyance was to have been made: *Whiteside v. Jennings*, 19 Ala. 784; *Bryant v. Hambrick*, 9 Ga. 133; *Plummer v. Rigdon*, 78 Ill. 222, 29 Am. Rep. 261; *Marshall v. Haney*, 4 Md. 498, 39 Am. Dec. 92; *Cannell v. McClean*, 6 Har. & J. 297; *Clagett v. Easterday*, 42 Md. 617; *Gridley v. Tucker*, Freem. Ch. (Miss.) 209; *Burr v. Todd*, 41 Pa. St. 206; *Shaw v. Wilkins' Admr.*, 8 Humph. 647, 49 Am. Dec. 692. And sometimes it is said to be the value of the land at the time of the breach, with interest from that time: *Pinkston v. Huie*, 9 Ala. 252; *Hamaker v. Coons*, 117 Ala. 603, 23 South. 655; *Sanderson v. Read*, 75 Ill. App. 190; *Brinckerhoff v. Phelps*, 24 Barb. 100; *Cock v. Taylor*, 2 Overt. 49, 5 Am. Dec. 650.

And in a very recent case in Illinois, it was said that the measure of damages is the cash market value of the land on the day of the breach, regardless of whether the market price on that date was permanent or not: *Dady v. Condit*, 209 Ill. 488, 70 N. E. 1078. Likewise it has been said that the measure of damages is the difference between the price agreed upon, and the value of the land when the breach occurred, with interest: *Nolde v. Gray* (Neb.), 102 N. W. 759. See, also, opinion on rehearing, 104 N. W. 165. And also that the measure of damages is the value of the land at the time of the breach in addition to the expenses incurred: *Kirkpatrick v. Downing*, 58 Mo. 32, 17 Am. Rep. 678. And, later on, it was said that the measure of damages was not the purchase price with interest, but the actual value of the land at the time it should have been conveyed: *Krepp v. St. Louis etc. Co.*, 99 Mo. App. 94, 72 S. W. 479.

And in a comparatively early case in Texas it was said that the measure of damages was the value of the land, less the unpaid purchase money, and whatever damages the vendee incidentally sustained: *Johnson v. Hamilton*, 36 Tex. 270. And in a more recent case in that state, it was said that where the title offered was not marketable, the vendee could have a rescission, but could not recover damages for the loss of his bargain where there is neither fraud nor willful refusal to convey: *Roberts v. McFaddin*, 32 Tex. Civ. 47, 74 S. W. 105. The various Texas authorities on the subject were exhaustively discussed in the case last cited. So, also, it is said that the measure of damages is the value of the land agreed to be conveyed at the time of the breach, less the unpaid purchase price: *Neppach v. Oregon etc. R. Co. (Or.)*, 80 Pac. 482; *Cornell v. Rodabaugh*, 117 Iowa, 287, 94 Am. St. Rep. 298, 90 N. W. 599; *Lee v. Russell*, 8 Ired. 526; *Nichols v. Freeman*, 11 Ired. 99. And it is said where the vendor unwarrantably refuses to convey, the measure of damages is the difference between the contract price and the market value at the time for conveyance: *King v. Ruckman*, 24 N. J. Eq. 298. But it is also said that where the contract is to convey with warranty of title, nominal damages only can be recovered where the breach is owing to the vendor's failure of title: *Gerbert v. Trustees*, 59 N. J. L. 160, 59 Am. St. Rep. 578, 35 Atl. 1121. And in Massachusetts, it was said the measure of damages for failing to convey a farm, with stock and tools, was the difference between their value at the time to be conveyed, and the contract price: *Hallett v. Taylor*, 177 Mass. 6, 58 N. E. 154. See, also, *Roche v. Smith*, 176 Mass. 595, 79 Am. St. Rep. 345, 58 N. E. 152, 51 L. R. A. 510, to the same general effect.

In *Morgan v. Stearns*, 40 Cal. 434, it was said that mere nominal damages do not belong to a case where the vendor has title to the premises and willfully refuses to convey, merely because the land has risen in value since the making of the agreement. But the general rule with respect to such damages is now fixed by statute: See Civ. Code, sec. 3306. In *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532, it was observed that the general rule was that the consideration with interest was the basis of recovery; but that where the contract to convey was based on a compromise of litigation, the value of the property, at the time for conveyance would necessarily be the rule. In this connection, see the principal case.

The United States supreme court in the oft-cited case of *Hopkins v. Lee*, 6 Wheat. 109, 5 L. ed. 218, held that in an action of covenant for not conveying the land, the value of the land at the time when it was to be conveyed is the measure of damages. And in the very recent case of *Watkins v. American Nat. Bank*, 134 Fed. 36, the court said: "The measure of damages for the total breach of a covenant to convey property is the value of the property which the vendor

agreed to convey, in case the purchase price has been paid. Where the price has not been paid, and the claim for it is released or abandoned, the measure of damages is the difference between the value of the property, and the unpaid purchase price."

It would seem that the amount of damages to be awarded in such cases ought to be measured on such a basis that the vendor will not make anything by violating his contract, and that, at the same time, the vendee will not lose anything by the breach. Perhaps the strongest reason for the rule allowing damages to be computed by the value of the property at the time of the breach and not merely limiting it to the consideration named in the contract is that in the former case validity and effect is given to the contract of sale, while in the latter case the parties are merely placed in the position in which they were when the contract was made.

We will discuss the varying circumstances which are often held to affect the rule as to the measure of damages in this class of cases in the remaining portion of this note.

VII. Effect of Varying Circumstances on the General Rule.

a. No Title or Defective One in Vendor.

1. *In General.*—In *Gerbert v. Trustees of Congregation*, 59 N. J. L. 160, 59 Am. St. Rep. 578, 35 Atl. 1121, it was held upon the breach of a contract to convey with warranty of title that nominal damages only are recoverable, where the breach is owing to the vendor's failure of title. Likewise, in *Rutledge v. Lawrence*, 1 A. K. Marsh. 293, it was so held where the vendor was not guilty of fraud, but the rule was said to be otherwise where the inability of the vendor to make a good title is produced by fraud. The case of *Margraf v. Muir*, 57 N. Y. 155, was an instance where the vendor was unable to convey, through having a defective title, but was liable only for nominal damages. And in this connection, see, also, *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115.

2. *Effect of Good or Bad Faith.*—In *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463, it was held, Justice Mason delivering the opinion, that a vendor is liable in nominal damages only for his breach where he contracted in good faith, believing that he had a good title, though he afterward discovered his title to be defective; but it was observed that this rule should not in any degree be extended to cases not exactly within it. A similar ruling was made in *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. But it was held where the contract to convey was made under a false assumption of authority as agent, the measure of damages would be the difference between the purchase price and the market value at the time of the breach: *Skaaraas v. Finnegan*, 31 Minn. 48, 16 N. W. 456. On the other hand, it was held in *Sikes v. Wild*, 4 Best & S. 421, that where the vendor did not have good title, but had reason

to believe that he would be able to secure it before the time for conveying, that he would not be charged with bad faith.

3. Vendor Being Merely a Cotenant.—Where the vendor, who was merely a cotenant, neither had title at time of contracting nor acquired it afterward, it was held that the measure of damages was the difference between the contract price and the value of the property at the time of the breach: *Dunshee v. Geoghegan*, 7 Utah, 113, 25 Pac. 731.

4. Knowledge on Part of Vendor of His Want of Title.—Vendor who contracts to sell and convey land must make good vendee's loss of bargain where he knows at the time that he had not the title or the power of conveyance, although he may have acted in good faith and believed that he would be able to procure a good title for the vendee: *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463.

b. Inability to Pass Good Title Caused by Vendor's Own Act.

1. Conveyance of Premises to Another.—Where the vendor had title at the time of entering into the contract of sale, but afterward disables himself from conveying according to his contract by conveying the property to another, the measure of damages is based on the value of the property at the time of his breach: *Carver v. Taylor*, 35 Neb. 429, 53 N. W. 386; *Matthews v. Matthews*, 133 N. Y. 679, 31 N. E. 519; *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857; *Wilson v. Spencer*, 11 Leigh, 261. And in *Doriocourt v. Lacroix*, 29 La. Ann. 286, it was held where the vendee bought land at auction, but vendor, refusing to convey, sold it to another person at an advance of eight hundred dollars, the vendee could recover such amount in an action for breach of the contract.

2. Title to Timber on Land Being in Another.—The measure of damages, where the breach is caused either from inability or refusal to perform, is the loss suffered by the vendee; hence where land is sold with standing timber thereon, to which there is a paramount title in another person, the loss of the vendee is the difference between the value of the land as sold with the timber on and its value after the removal of the timber, less the unpaid portion of the purchase price if any portion remains unpaid: *Vallentyne v. Immigration Land Co.* (Minn.), 103 N. W. 1028. And in this connection see, also, the principal case, *Arentsen v. Moreland*, ante, p. 951.

3. Forgetfulness Concerning Lease of the Premises.—The measure of damages will not be limited to nominal damages on the ground that the vendor was unable to convey because he had made a lease which he had forgotten about and the lessee refused to surrender possession, except on the payment of an unreasonable sum: *Cornell v. Redabaugh*, 117 Iowa, 237, 94 Am. St. Rep. 298, 90 N. W. 599.

c. Inability to Pass Good Title Caused by Unforeseen Circumstances.

1. **Secret Flaws in the Title.**—The measure of damages for a breach of the contract to convey is not lessened because the vendor, through unforeseen causes or because of secret flaws in his title, is unable to convey: *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Drake v. Baker*, 34 N. J. L. 358.

2. **Refusal of Wife to Join in the Conveyance.**—In accordance with what was said in the preceding paragraph, it is held that the refusal of the wife to sign the deed does not constitute an excuse for the breach of the contract to convey: *Drake v. Baker*, 34 N. J. L. 358; *Bitner v. Brough*, 11 Pa. St. 127. In *Burk v. Serrill*, 80 Pa. St. 413, 21 Am. Rep. 105, the wife refused to sign the deed, though the vendor was willing to sign a deed upon payment of the whole purchase price, but the vendee would only pay two-thirds of the purchase price under such circumstances. The court held that if the refusal of the wife was not fraudulent, "compensatory" damages only were recoverable, and that the law not permitting a wife to be coerced into signing a conveyance, they would not indirectly do so through allowing "exemplary" damages against the husband.

And the refusal of vendor's wife to join in the deed, the vendor being willing to convey, has been held not to constitute bad faith on the part of the vendor: *Yates v. James*, 89 Cal. 474, 26 Pac. 1073. See, also, *Jewel v. Norris*, 94 Iowa, 241, 62 N. W. 740. But where the husband and wife jointly agree to convey on refusal of the wife to join in the deed, it was held that the measure of damages was the difference between the contract price and value at the time of the breach. In *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. 627, the wife refused to join in the conveyance, but nothing was said as to that fact constituting an excuse.

d. Defective Title Known to Vendee at Time of Contracting.—In the principal case (*Arentsen v. Moreland*, ante, p. 951), it was held if a person contracts to sell and convey land to which both he and the purchaser knew he had no title, the latter may, nevertheless, on the breach of the contract recover for the loss of the bargain. But in *Rohr v. Kindt*, 3 Watts & S. 563, 39 Am. Dec. 53, the vendor was held relieved from responding for loss of vendee's bargain where the defect in the title was as well known to the vendee as to vendor.

e. Fact of Contract Being in Parol.—The cases in which the contract to convey was in parol do not seem to be numerous, outside of the state of Pennsylvania wherein, it seems, contracts for the sale of land were allowed to be made in parol through some difference between the statute of frauds in that state as distinguished from the usual provisions of the statute of frauds in other states. In a very late case in Pennsylvania—that of *Gray v. Howell*, 205

Pa. St. 211, 54 Atl. 774—it was held that an action may be maintained for the breach of a parol contract for the sale of land, but that the damages in such an action are limited to the recovery of the purchase money paid, or the value of the consideration given and the expenses incurred, but would not include the loss of the bargain. For a judicial history of the rules which have obtained with respect to the recovery of damages in such cases in that state, see *Bell v. Andrews*, 4 Dall. 152, 1 L. ed. 779; *Dumars v. Miller*, 34 Pa. St. 319; *Hertzog v. Hertzog's Admr.*, 34 Pa. St. 418; *McNair v. Compton*, 35 Pa. St. 23; *Ewing v. Thompson*, 66 Pa. St. 382; *Meason v. Kaine*, 67 Pa. St. 126; *Harris v. Harris*, 70 Pa. St. 170; *Thompson v. Sheplar*, 72 Pa. St. 160; *Tyson v. Eyrick*, 141 Pa. St. 296, 23 Am. St. Rep. 287, 21 Atl. 635; *Rineer v. Collins*, 156 Pa. St. 342, 27 Atl. 28.

And in *Welch v. Lawson*, 32 Miss. 170, 66 Am. Dec. 606, it was held that the vendee under a parol agreement could recover for his trouble, loss of time, etc., incurred upon the faith that the contract would be completed but could not recover for the loss of his bargain. In this connection see, also, *Cain v. Kelly*, 57 Miss. 830. In *Johnson v. Hamilton*, 36 Tex. 270, the contract was in parol, but that fact does not seem to have been considered important. While in *Lawrence v. Chase*, 54 Me. 196, the court merely observed that if the defendant desired to avail himself of the fact of the contract being in parol, he should have done so by a proper plea.

f. **Social Standing of the Parties.**—In *Rowland v. Dowe*, 2 Murph. (N. C.) 347, it was sought to affect the measure of damages recoverable by a consideration of the social standing of the parties, but the court said that their social standing had nothing to do with the measure of such damages.

g. **Fact that Land is Ultimately Conveyed.**—Where vendor ultimately conveys the land, the difference between the value when vendor should have conveyed and when actually conveyed, together with the rental during the intermission, has been held to be the measure of damages: *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216. And see, also, *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246, to the same effect.

VIII. Matters More Particularly Affecting the Amount of Damages Recoverable.

a. **Fact of Consideration Being Other Than Money.**—The measure of damages for the breach of a contract to convey land in consideration of the performance of an act of uncertain value by the vendee is not the value of the land, but the injury suffered by the vendee where before performance on his part the vendor gives him bona fide notice that he cannot convey for want of title, but the value of the land is the measure where the vendee has performed

such contract on his part: *Rohr v. Kindt*, 3 Watts & S. 563, 39 Am. Dec. 53.

b. **No Part of the Purchase Price having been Paid.**—Where the purchase money has not been paid, the measure is the difference between the contract price and the value of the property at the date of the breach: *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59.

c. **Only Part of Purchase Price having been Paid.**—Where part of the purchase price has been paid it does not seem to be disputed that the measure of damages is the value of the land at the time of the breach, where the rule obtains which allows damages based on that value, less so much of the price which remains unpaid: *Bange v. Paulin*, 37 Ill. App. 465; *Doherty v. Delan*, 65 Mo. 87, 20 Am. Rep. 677; *Pringle v. Spaulding*, 53 Barb. 17; *Johnson v. McMullen*, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670.

d. **Interest on Purchase Price Paid.**—It seems that at common law, interest was not allowed: *Sanderson v. Read*, 75 Ill. App. 190. Interest is not allowable in suits for breach of contract to convey, unless there is an established market value for the property or means by which it can be ascertained what amount the vendee is entitled to recover: *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752. In *Kicks v. State Bank*, 12 N. Dak. 576, 98 N. W. 408, it was held that the measure of damages for breach of a contract to convey land is the money paid on the contract with interest, if the vendor retains possession and without interest if the vendee has possession, though some of the cases allow the benefit of such possession to be counter-claimed as against the money paid. The court cited the following cases as sustaining the rule announced: *Harding v. Larkin*, 41 Ill. 413; *Hutchins v. Roundtree*, 77 Mo. 500; *Flint v. Steadman*, 36 Vt. 210; *Conrad v. Trustees*, 64 Wis. 258, 25 N. W. 24; *Williams v. Rogers*, 2 Dana, 375; *Baxter v. Ryers*, 13 Barb. 267; *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Click v. Green*, 77 Va. 827; *Spring v. Chase*, 22 Mo. 505, 30 Am. Dec. 505.

In *Worrall v. Minn*, 53 N. Y. 185, it was held where the vendee has paid the purchase price and the rental value of the property is less than the interest on the purchase money, the vendee is entitled to interest on the purchase money when kept out of the possession. As tending to support the award of interest, see *Pinkston v. Hill*, 9 Ala. 22; *Hamaker v. Coons*, 117 Ala. 603, 23 South. 655; *Sanderson v. Read*, 75 Ill. App. 190; *Lancoure v. Dupre*, 53 Minn. 301, 55 N. W. 129; *Nolde v. Gray* (Neb.), 102 N. W. 759; *Brinckerhoff v. Phelps*, 24 Barb. 100; *Cock v. Taylor*, 2 Overt. 49, 5 Am. Dec. 650; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532. But see, also, *Krepp v. St. Louis etc. Co.*, 99 Mo. App. 94, 72 S. W. 479.

e. **Placing of Improvements by Vendee.**—The right to recover for improvements placed upon property under various circumstances has been exhaustively considered in several monographic notes in

this series: See the notes to *Pitt v. Moore*, 6 Am St. Rep. 495; *Shepherd v. Jernigan*, 14 Am. St. Rep. 53; *Ward v. Ward*, 52 Am. St. Rep. 935; *Cleland v. Clark*, 81 Am. St. Rep. 164. As particularly concerning the recovery of improvements in suits for the breach of contracts to convey, see *Breja v. Pryne*, 94 Iowa, 755, 64 N. W. 669; *Cloud v. Whitlow*, 6 La. Ann. 743; *Lancoure v. Dupre*, 53 Minn. 301, 55 N. W. 129; *Fleckten v. Spicer*, 63 Minn. 454, 65 N. W. 926; *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. 627; *Gerbert v. Trustees*, 59 N. J. L. 160, 59 Am. St. Rep. 578, 35 Atl. 1121; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Walton v. Meeks*, 120 N. Y. 79, 23 N. E. 1115; *Tyson v. Eyrick*, 141 Pa. St. 296, 23 Am. St. Rep. 287, 21 Atl. 635; *Cade v. Brown*, 1 Wash. 401, 25 Pac. 457.

f. **Fact of Land having been in Possession of Vendee.**—The measure of damages, it was said in *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. 802, is the difference between the value of the land and the purchase price, but the value of the use of the land for the period during which payments were to be made cannot be added, for such value is an element included in making a correct estimate of the value of the land.

g. **Land to be Conveyed Being a Matter of Selection.**—Where a covenantor agrees to convey by a day certain one of several lots to be selected by the covenantee, the measure of damages where the covenantor fails to convey, where no demand is made on the covenantor to convey any particular lot, is the value of any unsold lot and interest from the commencement of the action: *Bell v. Quarles*, 5 Yerg. 463, 26 Am. Dec. 280.

h. **Decrease in Value of Land to be Conveyed.**—In *Carver v. Taylor*, 35 Neb. 429, 53 N. W. 386, it was said where the land is of less value than the contract price, the vendee is entitled to recover only nominal damages for the breach. And in *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677, it was held where there has been a part payment, and the land is worth less than the contract price at the time the conveyance should have been made, the vendee may recover what the land was then worth, less the amount of the purchase price that remained unpaid.

IX. Damages Accruing Subsequent to the Breach.

Chief Justice Marshall in *Letcher v. Woodson*, 1 Brock. 212, observed: "I can find no principle which, in a case of plain mistake with respect to title, will permit the damages to grow after the contract has been broken. I am therefore of the opinion that in this case the value of the land at the time of trial is not the standard of damages." So, also, in *Warner v. Bacon*, 8 Gray, 397, 69 Am. Dec. 253, damages sustained after action brought for breach of the contract to convey by reason of withholding the land from the plaintiff was held not recoverable in that action, though it was intimated it

might be in a subsequent action. And in *Houston etc. Co. v. Wright* (Tex. Civ. App.), 46 S. W. 884, it was held where the vendee sells after the time when the conveyance should have been made, but before the conveyance is actually made, the measure of damages is the difference in the market value of the land when the conveyance should have been delivered, by the original vendor, and that at the date vendee sold the land, unless vendee sold the land for more than the market value, in which event the measure of damages would be the difference in the market value at the date when the conveyance should have been delivered, and the price at which he sold the land unless the market value went higher after he should have received the deed, and before he sold, in which event he was entitled to have advantage of such rise, since the refusal to convey was a continuing wrong.

CLITHERO v. FENNER.

[122 Wis. 356, 99 N. W. 1027.]

ADVERSE POSSESSION, What Sufficient.—If One Incloses Land on Three Sides, and the fourth is bounded by a natural water-course sufficient to keep his stock within his inclosure, and the stock of others out of it, and he pastures it and cuts wood over it, and uses it generally as do owners of similar land, this is sufficient to support a finding of adverse possession on his part. (pp. 980, 981.)

ADVERSE POSSESSION, Tests of.—In determining whether acts constitute an adverse possession of real property, resort must be had to the usual and ordinary conduct of owners of such land. If the possession comports with the ordinary management of such lands by their owners, it furnishes sufficient evidence of an adverse possession. (p. 981.)

ADVERSE POSSESSION, Rights Under, When Pass to Land not Described in a Deed.—If the owner of a farm holds adverse possession of a tract adjacent thereto, and sells such farm and conveys it to another, the description containing no reference to the lands so adversely held, his rights pass to his grantee, and the united possession of the grantor and the grantee may create title by prescription. (pp. 981, 982.)

ADVERSE POSSESSION.—The Continuity of Adverse Possession is not Broken by the failure of the claimant to occupy the property personally, if others are in possession for him. (p. 982.)

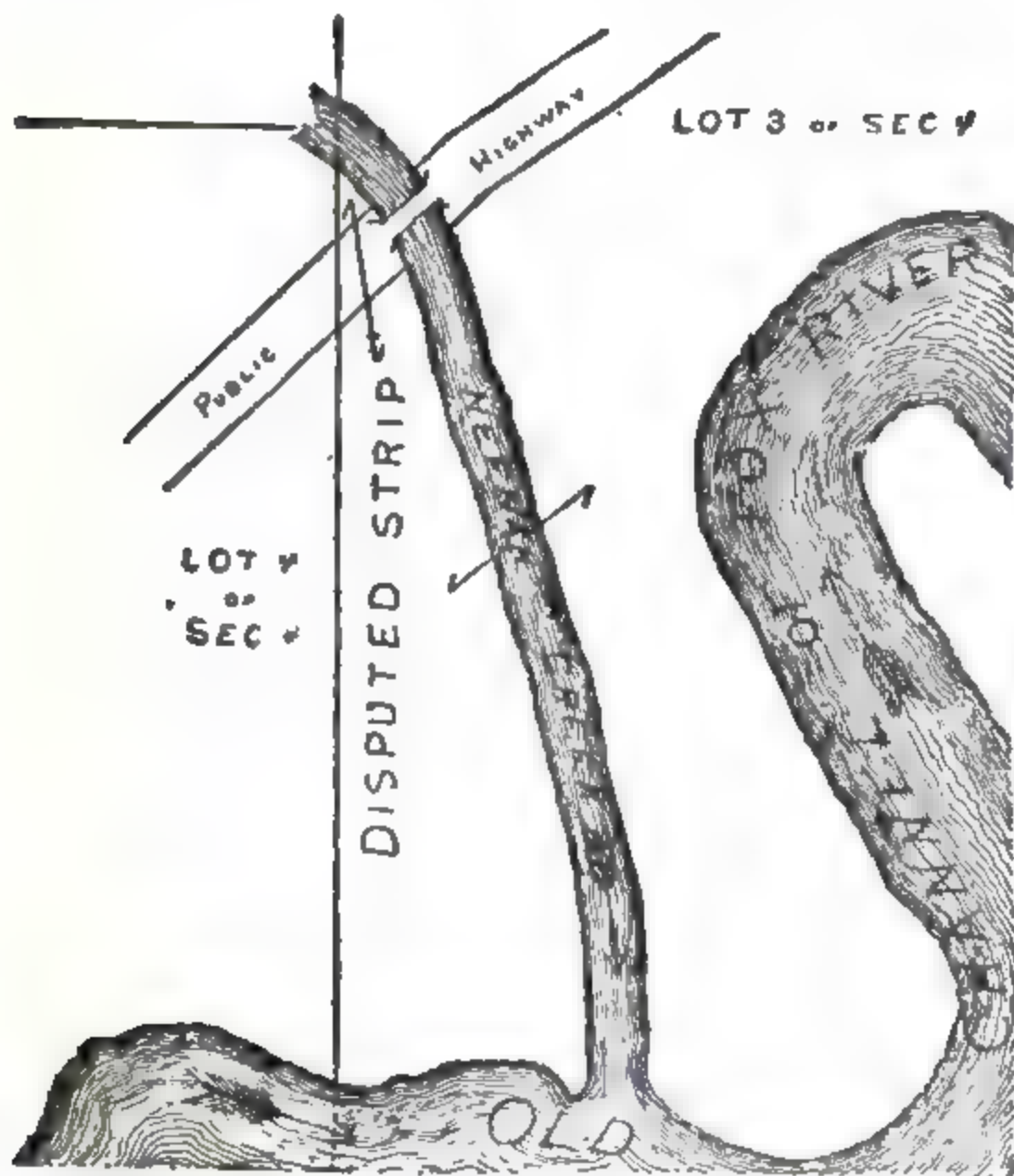
ADVERSE POSSESSION.—The Fact that One Who Holds Lands Adversely Negotiates with the Owner does not establish a relinquishment of the adverse claim, nor prevent the holder from asserting title by prescription. (p. 982.)

NEW TRIAL.—Newly Discovered Evidence does not Require the Granting of a New Trial where it is cumulative and impeaching testimony bearing upon the issues actually litigated, nor where the moving party did not use due diligence to secure such evidence at the trial. (p. 983.)

NEW TRIAL, Discretion of the Court.—The granting or refusing of a new trial upon newly discovered or impeaching evidence rests largely in the discretion of the trial court. (p. 983.)

Action to quiet title. The trial court found as follows:

"Respondent's father entered lot 4 of section 4, town of Fort Winnebago, Columbia county, in 1850. Upon complying with the requirements under the law as to payment for the land, he was entitled to a patent from the government in December, 1869. The strip of land in controversy consists of a part of lot 3 in the same section, adjoining lot 4 on the east. This strip is separated from the other part of lot 3 by a stream called 'Neenah creek.' The strip lying between



this stream and the boundary line between lots 3 and 4 is divided by a highway crossing its northern part. The bank of the creek is from ten to twelve feet high, and the channel is filled with water to the depth of a number of feet. No fence has ever been built on the line dividing the lots, as originally surveyed. The strip in dispute consists of a meadow, a swale,

and some high land. It is covered with grass, and has trees on part of it. Respondent's father and grantor cut timber on the strip as early as 1857 and as late as 1881, and used it for pasturage from 1857 to the time he sold it to respondent, in 1886 and 1887. During this period he also cut hay on both parts of the strip north and south of the highway. The northern part was cut continuously to the time appellant asserted his right to the land, about three years ago.

"About the year 1863 or 1864 respondent's father built a fence from Neenah creek, along the line of the highway, across this strip and lot 4, to the south boundary line; also a fence along the south boundary of lot 4 and this strip, to the waters, where Neenah creek and the Fox river unite. The inclosure thus made included that part of the strip in controversy south of the highway, and it was used by him for pasturage, with the adjoining inclosed part of lot 4, up to the time he sold and conveyed it to respondent. After such conveyance, respondent, and those in possession of the premises under him, continued to use and possess the premises, as the father before the sale. Throughout the years from 1857 this possession included the disputed strip; Neenah creek being treated as the boundary on the east instead of the line established by government survey between lots 3 and 4. This strip is not specifically described in the conveyance to respondent by his father in the deeds of 1886 and 1887, but he claims that he went into occupancy and possession of it as a part of the lands sold and transferred to him by his father, as one in adverse possession of the tract in controversy."

In 1892 appellant purchased lot 3, and occupied all of it except the disputed strip. He first exercised acts of ownership over the tract in dispute about three years before the trial of this action.

Judgment for the plaintiff, and defendants appealed.

Daniel H. Grady, for the appellant.

Fowler & McNamara, for the respondent.

300 SIEBECKER, J. It is contended that the evidence in this case does not sustain the findings of the lower court, as given in the foregoing statement of facts. The court found that respondent's predecessor did occupy the disputed tract. The testimony is direct and positive, showing that respondent's father used the tract in connection with the farm he owned,

described as lot 4, and other lands, from the year 1857 to the time he sold it in 1886 and 1887. This use consisted in pasturing the fields up to the creek, and cutting timber and hay off it at different seasons, throughout these years. He also inclosed it with a fence on all sides, except along the creek, where the bank and water formed a natural barrier, keeping his stock from straying off the field, and keeping the stock of others from entering upon it. The use thus made of the tract in dispute, in connection with the adjoining field, was in fact an open and hostile occupancy and possession as against the true owner. This use and occupancy is furthermore shown to have been the ordinary and customary use to which the premises, in their condition and circumstances, were adapted. Such use and occupancy clearly indicated the extent and boundary of such adverse possession. There is ample competent evidence in the case to warrant the court in so finding. This court cannot, therefore, interfere with the conclusions of the trial court, holding that the acts of ownership by respondent and his father showed a claim of right to the property, and were in fact an actual, continuous, and exclusive occupancy, and had ripened into a title by adverse possession. The nature of the occupancy constituting an adverse possession under the statutes is fully discussed in *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402, approving the case of *Clark v. Potter*, 32 Ohio St. 64, which declares: "As the character of the possession depends on the nature and situation of the property and the use to which it can be applied or to which the owner may choose to apply it, it is evident that resort must be had to the usual and ordinary ³⁶¹ conduct of owners of such land to determine if it is sufficient. If the possession comports with ordinary management of similar lands by their owners, it furnishes sufficient evidence of adverse possession": *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610; *Lampman v. Van Alstyne*, 94 Wis. 417, 69 N. W. 171; *Illinois Steel Co. v. Budzisz*, 106 Wis. 499, 80 Am. St. Rep. 54, 82 N. W. 534, 48 L. R. A. 830; *Illinois Steel Co. v. Jeka*, 119 Wis. 122, 95 N. W. 97.

It is asserted that respondent cannot maintain this action because he acquired no title to the strip in question under the deed. It is true, the tract is not specifically described or covered by the description set out in the deed of this farm from respondent's father. As above stated, the evidence supports the conclusion that the father was in possession of

the disputed part, which adjoins his land, and that he treated it as a part of the farm which he conveyed to respondent, and that he transferred possession of the whole. It is also apparent from the evidence that respondent took possession of the whole, by occupying it, inclosing it, and using the part specified in the deed and this adjoining strip as an entirety. In the light of these circumstances, the presumption that the conveyance must be limited to the calls of the deed is overcome by the established facts that respondent obtained possession of the tract outside of the description as a part of the premises purchased under the deed. Such a transfer establishes a successive relationship to the tract in controversy, making the parties to the transfer privies in possession, thus conferring all the legal rights of the father, as vendor, on respondent, as his vendee: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905, 84 N. W. 855, 85 N. W. 402, and cases cited; *Bishop v. Bleyer*, 105 Wis. 330, 81 N. W. 413.

. It is contended that there was a break in the continuity and rights under the adverse possession, because respondent did not personally occupy the premises after his purchase until 1891. The possession of the premises from the time of the execution of the deeds in 1886 and 1887, as disclosed ³⁶² by the evidence, was either a continuance of the father's possession, or the father and others were in possession for respondent as owner. In either view, the possession was adverse to the true owner, and must inure to the benefit of respondent. Nor did the transaction between the parties in reference to the disputed boundary show that respondent made no claim to the tract in dispute. He persisted in his claim of ownership of the tract, though they negotiated for a settlement of the dispute. That the trial court so found follows from the judgment it awarded. Negotiations to purchase the strip from appellant, to settle the dispute; do not in themselves absolutely establish a relinquishment of the claim of the rights acquired by adverse possession: *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720.

We cannot disturb these findings as against the clear preponderance of the evidence. These conclusions upon the material issues entitled respondent to judgment upon the facts as found by the trial court.

Several exceptions to evidence are argued upon the ground that the proof received over objection was incompetent. The evidence objected to tended to show that respondent's father at different times made declarations to various parties indi-

cating that he was the owner of the land in dispute. At the conclusion of the testimony the court struck out parts of this evidence, but the record does not clearly show what parts were so stricken out. Since the court's findings of facts are sustained by other competent evidence, no prejudicial error was committed by these rulings upon the evidence.

It is urged that the court erred in refusing to grant a new trial upon the ground of newly discovered evidence. An inspection of the affidavits setting out what evidence appellant claims to have discovered since the trial shows that it is cumulative and impeaching testimony bearing upon the issues actually litigated. Nor does it appear that appellant used due diligence to secure what he now submits as newly ³⁶³ discovered evidence. Such a showing is necessary to entitle him to a new trial upon this ground. This court has repeatedly announced its adherence to the rule that the granting or refusal of a new trial upon newly discovered cumulative or impeaching evidence rests largely in the discretion of the trial court. There is nothing showing any abuse of discretion in denying the motion: *McLimans v. Lancaster*, 57 Wis. 297, 15 N. W. 194; *Schillinger v. Verona*, 85 Wis. 589, 55 N. W. 1040; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271; *Hooker v. Chicago etc. Ry. Co.*, 76 Wis. 542, 44 N. W. 1085; *Smith v. Champagne*, 72 Wis. 480, 40 N. W. 398; *Knopke v. Germantown F. M. Ins. Co.*, 99 Wis. 289, 74 N. W. 795.

The questions we have considered are decisive of the rights of the parties under the issues of the case, and the judgment must stand.

By the Court. Judgment affirmed.

Adverse Possession of Land may be disclosed by the appropriate use of the property by the claimant, according to its quality and condition, and may be by fencing and pasturing the land: *Omaha etc. Trust Co. v. Parker*, 33 Neb. 775, 29 Am. St. Rep. 506; note to *De Frieze v. Quint*, 28 Am. St. Rep. 160. Neither fences nor cultivation are essential to such possession when the acts of ownership are those to which the land is adapted: *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45. The occupancy need be only such as the land is adapted to under the circumstances of the particular case: *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 83 Am. St. Rep. 905.

The Possession of a Grantee may be tacked to that of his grantor to make out the period of limitation: *Roberson v. Downing Co.*, 120 Ga. 833, 102 Am. St. Rep. 128. Successive grantors can transfer their possession of a strip of land not included in the description in the deeds, but successively and continuously occupied as part of the premises; and by such possession a title by prescription may be acquired: *Wishart v. McKnight*, 178 Mass. 356, 86 Am. St. Rep. 486.

GREEN BAY LODGE v. GREEN BAY.

[122 Wis. 452, 99 N. W. 837.]

TAXATION, Exemption from—Benevolent Purpose, What is not.—A clubhouse and lodge building held by a local lodge of the Benevolent and Protective Order of Elks, and used for their meetings and for the accommodation of lodge members and their families for fraternal and social intercourse, and as a place of entertainment and amusement, with buffet and dining-room accommodations for refreshments, are not exempt from taxation under a statute exempting the property owned by any religious, scientific, literary or benevolent association, if not leased or used for other pecuniary profit, where the accommodation for the entertainment, amusement and refreshment of members and their families and guests is maintained by a system of charges to members regulated with a view to covering the expense, any profit resulting being paid into the treasury. (pp. 987, 988.)

Suit to set aside taxes and restrain their collection by the plaintiffs as trustees of the Green Bay Lodge of the Benevolent and Protective Order of Elks, who, as such, held title to the clubhouse property in the city of Green Bay. The case was submitted upon an agreed statement of facts to the following effect:

“That the Benevolent and Protective Order of Elks of America, of which this is a local lodge, is a fraternal organization, using its funds for lodge purposes, with no pecuniary or insurance benefit to the members of the order. The order is made up of local lodges in cities in the United States having a population of over five thousand, which are under the control of the grand lodge. The expenses of the grand lodge are provided for by a tax on the members of the order, charter fees, and by some other revenues arising from transactions between it and the local lodges. These revenues are devoted to the expenses of its sessions, to salaries, and to the expenses of its general officers. The grand lodge is also authorized to assess a per capita tax of not to exceed twenty-five cents on each member for the maintenance of a home for aged and indigent Elks. Such a home has been established and is being maintained in the state of Virginia. The local lodge at Green Bay has made contributions to the support of this home, though the amounts are not shown. The members are taught to be observant of benevolence and charity, and to practice these ennobling attributes in dispensing help to the deserving and needy among its members, and to such other persons as may receive aid at their hands. It appears that considerable sums are contributed

by the lodges, and are expended for charitable purposes throughout the country. Green Bay Lodge has never contributed for such purposes out of its treasury. On one occasion it contributed a considerable sum for the burial of one of its members, but it was subsequently reimbursed by private parties.

“The membership of the local lodges is composed of persons selected by the lodge upon application for membership. Every local lodge provides the method and means for raising funds to defray all necessary expenses incurred in maintaining the lodge. The organizations are voluntary associations, and are under the government of a constitution and the by-laws of the order, and are subject to such regulations as each lodge may adopt, not inconsistent with the object and purposes of the order and the general government imposed by the grand lodge. Every such local lodge must procure a charter from the grand lodge to constitute it a branch of the order, and this charter may be surrendered or forfeited upon the grounds prescribed by the governing body.

“The property in question consists of the land owned by the lodge, with a two-story and basement brick clubhouse and lodge building. The basement is devoted to bowling-alleys, baths, etc., the first floor to reception and clubrooms, billiard, pool-table, and cardrooms, a kitchen, a buffet and dining-room; and the second floor is used as a lodge-room and has the accompanying anterooms and halls. The clubhouse and the lodge-rooms and all the contents are the property and are under the control and management of the lodge. The second floor of the building is used for holding the lodge meetings, while the first floor and basement are used for the accommodation of the lodge members and their families for fraternal and social intercourse and as a place of entertainment and amusement, with the usual clubhouse buffet and dining-room accommodations for refreshments. This building, with its accommodations, has not been leased or rented. The cost of the real estate, buildings, fixtures, and furnishings amount to about the sum of twenty-seven thousand dollars.

“The revenues of the lodge consist of the initiation fees, the annual membership dues, and the receipts from the use of the bowling-alleys, billiard and pool-tables, and from the sales of refreshments at the buffet and dining-room. This revenue goes into the lodge treasury to defray the expense incident to the maintenance of the lodge and building and all the purposes of the order. No pecuniary profit, by way of payment of any

money as dividend, is awarded to any person or member of the order. All charges to members, aside from annual dues, are scaled to meet the needs of the lodge to pay the running expenses and obligations, including principal and interest due on the loans which are secured by a trust deed upon the property. The clubhouse features and privileges are not free to members, but under the control and management of the lodge, many of them are only to be enjoyed for a money consideration, under a fixed scale of prices, and whatever profits, if any, arise therefrom go into the lodge treasury. The privileges of the clubhouse may be extended to guests of the members under the restrictions imposed and at the member's expense. Four or five men who have loaned money to the lodge, and are not members, are afforded the privileges of the club. They have no voice in the control and management of the property, nor in the affairs of the lodge, and they are treated as guests."

Judgment in the circuit court was given in favor of the defendants, and the plaintiffs appealed.

B. L. Parker and W. L. Evans, for the appellants

T. P. Silverwood and J. H. McGillan, for the respondents.

457 SIEBECKER, J. The question, under the foregoing statements of facts, presents the inquiry: Is this property exempt from taxation under subdivision 3, section 1038, Statutes of 1898? This portion of the statutes declares that:

"Personal property owned by any religious, scientific, literary or benevolent associations, used expressly for the purposes of such associations, and the real property, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres," shall be exempt from taxation.

It is argued that this local lodge of the Benevolent and Protective Order of Elks of America is such an organization as is contemplated by the statute. Whether the organization is of such a benevolent character we must ascertain from an examination of its purposes and the activities employed to fulfill its objects. The order declares in its constitution:

"The business and objects of the order shall be to aid and protect its members and their families, and to promote friendship and social intercourse, and the subordinate lodges shall provide funds for these purposes."

To fulfill these aims, local lodges are instituted in cities within the United States with a population of at least five thousand. The membership consists of persons selected and approved by the lodge from those who apply for affiliation. This body of members and their families are the persons for whose benefit the clubhouse and lodge-room are maintained. The facts disclose that the property is mainly used for the purposes of a clubhouse, providing accommodations for entertainment, amusement, and refreshment at the buffet and dining-room.

⁴⁵⁸ Such being the principal uses of this property, can they be said to be such as are contemplated by these statutes exempting property from bearing the usual burdens of taxation?

The benevolent purposes of such an organization as the statute contemplates are, in a measure, akin to charitable purposes, in that they bestow benefits through their efforts and means on either its members or the public by assisting the needy or promoting some benefaction by advancing and supporting agencies of a beneficial public nature. While some of the aims of the order are the promotion of benevolence and charity, it is the avowed and obvious purpose of the order to maintain this clubhouse as a suitable place for the members and their families to congregate for entertainment, amusement, and to provide refreshments. The bestowal of these privileges and benefits is not of a benevolent or charitable character. These privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes and means, and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose. The learned trial judge pertinently suggests that, if the furnishing of club-rooms, facilities for enjoying games, or cards, billiards, pool, and tenpins, and providing the necessaries for a buffet and dining and bath rooms are benevolent purposes within the meaning of the statutes, then any number of men may organize themselves into a corporate body to provide these privileges and benefits for themselves and their guests, and claim the exemption of the statutes. We do not find that the maintenance of the clubhouse is a benevolent purpose within the meaning of the statutes: *St. Joseph's Hospital Assn. v. Ashland Co.*, 96 Wis. 636, 72 N. W. 43; *Hibernian Benevolent Soc. v. Kelly*, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3, 30 L. R. A. 167; *Young Men's Christian Assn. v. New York*, 113 N. Y. 187, 21 N. E. 86; *Young Men's P. T. & B. Soc. v. Fall River*, 160 Mass. 409, 36 N. E. 57; *People v. Nelson*, 46 N. Y. 477.

⁴⁵⁹ The statute also requires that the property of a benevolent organization claimed as exempt from taxation shall not be leased nor used for pecuniary profit. It is argued that, since the members of the lodge receive no money by way of dividend or the distribution of any funds of the lodge, but, on the other hand, pay annual dues and the charges necessary to maintain the establishment, there is no use of the property for pecuniary profit. The facts disclose that the clubhouse features are maintained by a system of charges to members under a fixed scale of prices for indulging in these privileges and for purchasers at the buffet and dining-room. The charges are regulated with a view to covering all necessary expense incident to conducting these clubhouse features, and if a slight profit results it is paid into the treasury of the lodge. Though this arrangement may not result in paying profits to members by distributing a surplus, yet the transaction may be a pecuniary profit to the lodge, in receiving any surplus over expense, and in a commercial sense the whole scheme may be of considerable pecuniary benefit to the members who are patrons and customers of the clubhouse enterprises, in that they receive the benefit of the reduced cost of these privileges so provided them as patrons and supporters of the clubhouse as a business enterprise.

Upon these grounds we are led to the conclusion that the purposes of the organization in maintaining the clubhouse do not come within the term of benevolent organizations, as contemplated by the statute, and that the uses made of the property in carrying these purposes into effect may and do result in using the property for pecuniary profit. The circuit court ruled correctly in holding that the property was not exempt from taxation.

By the Court. Judgment affirmed.

Dodge, J., took no part.

For Authorities bearing upon the decision in the principal case, see Philadelphia v. Masonic Home, 160 Pa. St. 572, 40 Am. St. Rep. 736; Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769; Commonwealth v. Young Men's Christian Assn., 116 Ky. 711, 105 Am. St. Rep. 234.

VOGT v. SCHIENEBECK.

[122 Wis. 491, 100 N. W. 820.]

A SALE "F. O. B." Cars Imposes on the Seller the Duty of Obtaining Cars upon which the subject of the sale is to be loaded. (p. 992.)

CONTRACT, Prior Negotiations, When Merged in.—When a contract is reduced to writing, all prior negotiations are merged therein, in the absence of relievable fraud or mistake, unless the writing appears clearly to be merely a part execution of a verbal contract. (p. 994.)

CONTRACT, Parol Evidence to Vary.—Where a seller agrees in writing to deliver the subject of a sale "f. o. b." cars, parol evidence is not admissible to prove that prior to the making of such contract he agreed to furnish cars. (p. 994.)

CONTRACT, Evidence to Explain Meaning of.—The Term "F. O. B. Cars" has a meaning so plain that it is not permissible to explain it by custom or otherwise. (p. 994.)

THE MEANING OF THE LANGUAGE Used in a Contract can be Shown by Custom only when it is ambiguous. (p. 994.)

SALE, Damages for Breach of Contract of.—In an Action to Recover Damages for the Breach of an Executory Contract to Sell and Deliver Goods, the difference between the market price of the goods at the time and place specified in the contract for delivery and the contract price is ordinarily the measure of damages. (p. 996.)

SALE, Breach of Contract of—Damages, When Controlled by the Place to Which Shipment is to be Made.—If a contract for the sale of personal property stipulates for its delivery at a designated place, and it is known that the purchaser proposes to ship it to another place, and, on breach of the contract to deliver, such property cannot be obtained at such place of delivery, the measure of damages is the difference between the value of the property at the place to which it was shipped, and the contract price, less what it would cost for inspection fees and freight, had the contract been performed, with interest on the principal sum at the regular rate from the time of the breach to the date of the recovery. (pp. 996, 997.)

Action to recover damages for the breach of a contract to sell to the plaintiff one hundred thousand feet of one-inch pine lumber then at Stadler's mill, near Butternut, Wisconsin, the delivery to be made to plaintiff free on board of cars at that place, upon demand, within two months from November 15, 1902, and that the defendant refused to deliver such lumber, when demanded, to the plaintiff's damage in the sum of fifteen hundred dollars.

The defendant, in his answer, denied the allegations of the complaint, and then alleged the making of a contract, differ-

ing from that stated in the complaint only in that such contract was averred to contain an agreement that the cars for use in delivering the lumber were to be furnished by the plaintiff; that the plaintiff did not furnish such cars, but at all times refused to do so. The contract between the parties was in writing and is as follows:

"Received of Paul Vogt of Milwaukee, Wis., Five (5) Dollars on account of sale to him by me, made this 15th day of November, 1902, of 100,000 feet more or less of pine one-inch lumber at Eight Dollars per 1,000 feet cull & Fifteen Dollars per 1,000 feet common or better now at Stadler's Mill, f. o. b. cars Butternut, Wis., to be delivered upon demand within two months from above date. Inspection fees paid by both of us.

"Dated at Butternut, Wis., Novbr. 15th, 1902.

"JOSEPH SCHIENEBECK."

At the trial, defendant was allowed, against the plaintiff's objections, to introduce evidence tending to show that when the contract was made, plaintiff verbally agreed to furnish cars for use in delivering the lumber, and also that such was the custom as between buyer and seller. The jury was instructed that the burden of proof was on the plaintiff to show that defendant agreed to furnish the cars, and that, unless the jury were satisfied that he did so agree, he was entitled to judgment; otherwise that plaintiff was entitled to judgment to the extent of the difference between the contract price for lumber and its value at the time and place where and when it should have been delivered, if such lumber were purchaseable at such place; otherwise the difference between the contract price and the value of the lumber at Milwaukee, less one-half the reasonable fees of inspection and what it would cost to transport the lumber from the agreed place of delivery to Milwaukee. The jury was required to find whether "f. o. b." as used in the contract meant free on board the cars, and was instructed that if such were the case, it was the defendant's duty to furnish the cars in the absence of an agreement to the contrary, and that the plaintiff, to recover, must prove that the words "f. o. b. cars" meant that the defendant must furnish cars for shipment of the lumber.

The defendant moved for a verdict at the close of the evidence, which was refused. The jury afterward returned a verdict in favor of the defendant upon which judgment was entered, and from which plaintiff appealed.

Bohmrich & Williams, for the appellant.

Salter & Holland, for the respondent.

⁴⁹⁴ MARSHALL, J. The motion for a verdict in appellant's favor was based on the assumption that from the contract or evidence, or both, it conclusively appeared that it was respondent's duty to furnish the cars. The trial court's view, as indicated in the statement, was that *prima facie* the contract requiring respondent to deliver the logs f. o. b. cars at the point where the transit by rail was to commence, burdened appellant with the duty of furnishing the cars. So the jury were instructed. ⁴⁹⁵ "The plaintiff must prove by a fair preponderance of evidence that the words 'f. o. b. cars' as used in this case mean that the defendant is required to furnish the cars for the shipment of the lumber in question."

That is consistent only with this broad proposition being correct: As between buyer and seller of property to be conveyed by a common carrier, the seller having agreed to deliver the subject of sale to the buyer "f. o. b. cars" at the place where the transit is to begin, the implication of law or of fact is that the buyer is to furnish the cars in place ready for loading. Doubtless the learned circuit court was guided by *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, where, as regards a contract the same in effect as the one before us, requiring the seller of logs to deliver the same on board cars for shipment, though the set phrase "f. o. b. cars" was not used, it was said: "The duty of the defendant in regard to the delivery of the logs under contract ended when they were placed on the cars. By the terms of the contract the plaintiffs were to receive them on the cars, and then the absolute title passed to them. The defendant was in no way bound to pay for the use of the cars on which they were to be loaded, or to pay for their transportation after they were placed on the cars. The plain inference to be derived from the contract is that the plaintiffs were to furnish the cars to receive and transport the logs to their destination."

No authority is cited to the proposition. Reference in the opinion to the attitude of counsel in respect to the matter and the printed arguments, indicate that the point was not contested in such a manner as to stimulate a very careful consideration of a doubtful question. The proposition seems contrary to universal understanding, which ought to be deemed a matter of judicial cognizance without the aid of evidence or adjudged

cases. We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him f. o. b. cars at the point of starting, such other, as a matter of course, is expected ⁴⁹⁶ to obtain from the railway company the necessary cars upon which to load the subject of the deal. Yet the doctrine of the Boyington case is not wholly without support: *Kunkle v. Mitchell*, 56 Pa. St. 100; *Dwight v. Eckert*, 117 Pa. St. 508, 12 Atl. 32; *Hocking v. Hamilton*, 158 Pa. St. 107, 27 Atl. 836. However, this court, in the recent case of *John O'Brien L. Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, expressly repudiated such doctrine, holding that a seller, in the circumstances stated, impliedly agrees to obtain the cars and not hold the buyer to any obligation till the goods are loaded thereon. So far as *Boyington v. Sweeney* is to the contrary it was, in effect, though not in express terms, there overruled. This language was used by Mr. Justice Dodge, speaking for the court: "The general rule is that one who undertakes to accomplish a certain result, by necessary implication agrees to supply all the means necessary to such result. . . . Under this general rule it would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work. Both are alike in the open market, as much at the command of one as another, and the obtaining of each is equally essential to the accomplishment of the result."

"For the reasons stated, we cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on appellants the duty of obtaining the cars upon which they had agreed to load the logs."

That is supported by authorities generally holding that a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage in transitu: *A. J. Neimeyer L. Co. v. Barlington etc. R. R. Co.*, 54 Neb. 321, 74 N. W. ⁴⁹⁷ 670, 40 L. R. A. 534; *Congdon v. Kendall*, 53 Neb. 282, 73 N. W. 659; *Capehart v. Furman F. I. Co.* 103 Ala. 671, 49 Am. St. Rep. 60, 16 South. 627; *Sheffield F. Co. v. Hull C. & C. Co.*, 101 Ala. 446, 14 South. 672; *Knapp E.*

Works v. New York I. W. Co., 157 Ill. 456, 42 N. E. 147; Silberman v. Clark, 96 N. Y. 522; Ex parte Rosevear C. C. Co., 11 Ch. D. 560; Miller v. Seaman, 176 Pa. St. 291, 35 Atl. 134; Benjamin on Sales, 6th ed., 682; 1 Mechem on Sales, sec. 741, note; 4 Elliott on Railroads, sec. 1425. All of such authorities declare that a sale "f. o. b. cars" so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier that the term is not open to construction. Some hold that evidence is admissible to show that the letters "f. o. b." as used in mercantile contracts stand for the words "free on board"; but, generally speaking, it is held that the courts will take judicial notice that such is the meaning, and that the import of the words is too plain to call for or permit judicial construction. It may be that such meaning would only *prima facie* include procurement by the seller of the carrier of cars, in place, ready for loading and that a general custom, so well established as to become a part of the contract, might vary such *prima facie* meaning. But the burden would necessarily be upon the seller to establish such custom. It follows that the instruction under consideration is erroneous, and that, so far as such error led to the decision against appellant on the motion for a verdict, such decision is erroneous.

There was evidence on the part of the defendant to the effect that at the time of the verbal agreement preceding the making of the written contract, plaintiff said he would furnish the cars. The learned trial court denied the motion for judgment, assuming that such evidence raised a question for the jury. That is plain, because he expressly referred to such evidence in submitting the cause as to whether the plaintiff did or did not agree to furnish the cars. In that it seems the ⁴⁹⁸ rule, that a written contract cannot be varied by parol evidence of what was said between the parties prior to or at the time of the making of the writing, was overlooked. The final result of all negotiation eventuating in the making of a contract which is reduced to writing, in the absence of relievable fraud or mistake, is conclusively presumed to be embodied therein, unless the writing appears clearly to be merely a part execution of an entire verbal contract, which is not the case in the instance before us. Here was the ordinary occurrence of closing contractual negotiations by reducing the consequent verbal agreement to writing. If, in doing so, anything was left out, the party prejudiced is without remedy upon the contract except

to appeal to equity for its reformation and the enforcement thereof as corrected: *John O'Brien L. Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Braun v. Wisconsin R. Co.*, 92 Wis. 245, 66 N. W. 196; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751. In *Braun v. Wisconsin R. Co.*, it was said that the exception mentioned, to the exclusion of evidence of what was said or occurred at the time of making a written contract, is never to be so extended as to permit evidence of mere contemporaneous stipulations or conditions, the writing being the agreement reached and not a mere part performance or incident of it. It follows that the oral testimony as to what plaintiff said respecting who was to furnish the cars, when the contract was made, cannot be regarded as a justification for denying appellant's motion for a verdict.

Whether, in denying the motion, the learned circuit court was in doubt as to whether the term "f. o. b. 'cars'" was ambiguous in that it might or might not mean that the seller was to place the lumber on cars and procure them to be put in place for that purpose, and that such doubt involved a question of fact, is not altogether certain. This language was used in the charge: ⁴⁹⁹ "The evidence that 'f. o. b.' mean free on board cars is not disputed. In deciding this case you must take into consideration the written contract, . . . and you will observe the letters 'f. o. b.' are used therein, and if you find 'f. o. b.' mean free on board cars, it was the duty of the defendant to furnish the cars."

There being no question, as we have seen, but that the meaning of "f. o. b." as used in the contract is free on board cars, the court erroneously denied the motion for a verdict upon the theory that it was permissible for the jury to find some other meaning.

It does not seem to have occurred to the learned circuit court that "free on board cars" might not so conclusively indicate that the seller was to provide cars in place for him to load the lumber as to preclude evidence of a binding custom to the contrary. Witnesses were erroneously permitted to testify as to the meaning of "f. o. b.," when, as we have seen, it is so plain that it was not permissible to explain it by custom or otherwise. The meaning of language used in a contract can only be shown by custom when it is ambiguous. Such evidence is permissible to interpret or explain or aid in that regard, not to contradict or add something not within the reasonable meaning of the language of the contract: 1 Greenleaf on Evidence, 294, 295.

In *Sheffield F. Co. v. Hull C. & C. Co.*, 101 Ala. 446, 481, 14 South. 672, and the other case to which we have referred, it is held correctly, as we believe, that the meaning of "f. o. b." and "free on board," as customarily used in mercantile contracts, is so obvious as not to be open to interpretation. Whether such meaning includes, under the circumstances of this case, the duty of the seller to procure the cars in place for his use in loading the merchandise and evidence is not permissible to show the existence of a custom which the parties contracted with reference thereto, is not altogether plain, but we are constrained to hold that it does. In any event, the inference from the use of such term could ⁵⁰⁰ only be changed by clear proof of the existence of a custom, and that the buyer knew thereof at the time of contracting, or that it had existed so long that, presumably, he knew thereof: *Hall v. Storrs*, 7 Wis. 253. There was no such clear evidence here. There was no definite evidence at all in the matter.

The court correctly instructed the jury that plaintiff duly demanded of the defendant shipment of the lumber under the contract. That, in connection with what has heretofore been said, shows there was nothing to submit to the jury as to whether defendant was guilty of an actionable breach of the contract as alleged in the complaint. Therefore the court erred in refusing to take all the questions from the jury except such as related to the damages appellant was entitled to recover.

Complaint is made because the court permitted evidence to go to the jury as to the market value, at the agreed time and place for the delivery of such lumber as that in question, though there was no evidence that there was a like quantity of such lumber then and there, or in that vicinity, which could have been purchased. A careful examination of the record satisfies us that error was committed in this respect. Respondent's counsel refers to places where it is said evidence can be found supporting his contention, but we are unable to find it. It is not in the record. On the contrary, the evidence referred to establishes the contention of appellant. The statement is made that lumber like that in question could have been obtained in most any lumber yard in the vicinity of Butternut or along the Central Railroad, referring to the evidence of Mr. Altman, who testified, however, in effect, that no such quantity of lumber of the agreed quality was so obtainable. A like quantity of lumber of better quality could have been so obtained, but none of consequence of the same

quality. As the evidence stood when the case was submitted to the jury, it seems that the rule in *Cockburn v. Ashland L. Co.*, 54 Wis. 619, 12 N. W. 49, governed, as claimed by appellant's counsel. The general rule, as there stated, is: "In actions to recover damages for the breach of an executory contract to sell and deliver goods, the difference between the market price of the goods at the time and place specified in the contract for delivering the same and the contract price, is the measure of damages. The basis of this rule is, that on failure of the vendor to deliver, the purchaser may go into the market at the time and place of delivery, and supply himself with the same kind of goods at the market price. Hence, the difference between what he is compelled to pay for the goods, and what they would have cost him had the vendor performed his contract, justly measures the damages which he has sustained by the breach of the contract. But this rule presupposes that the purchasers may go into the market at the agreed time and place of delivery and obtain the goods."

But it is said that, where the basis for the rule does not exist, then some other rule must be applied that will, so far as practicable, satisfy the broad principle that recoverable damages for breach of contract are "such as may fairly and reasonably be considered as either arising naturally, i. e., according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Respondent knew at the time the contract in question was made that the subject thereof was to be shipped to appellant at Milwaukee, Wisconsin. He must have apprehended that if he failed to make the delivery according to agreement, and appellant could not supply himself with the same amount and quality of lumber at or in the vicinity of the delivery point, he would probably suffer damages to the extent of the difference between the market value of such lumber at Milwaukee at the agreed time for delivery, and the contract price, less what it would have cost appellant for inspection fees and freight had the contract been performed, with interest on the principal sum of damages at the legal rate from the time ⁵⁰² of the breach to the date of the recovery. That is the rule of damages contended for by appellant's counsel, and is approved.

Some other questions are presented by appellant's counsel, but they are all covered incidentally by the conclusions here-

tofore reached, or are rendered thereby immaterial, and therefore specific reference thereto and a discussion thereof becomes unnecessary and will be omitted.

By the Court. The judgment is reversed and the cause remanded for a new trial.

If Goods Sold are not Delivered, the measure of damages usually is their market value at the time and place at which they should have been delivered, with interest. But when special circumstances are known to both parties, and they contract with reference thereto, the one in default may be answerable for whatever damages the other sustains as the reasonable and natural consequences of a breach under the circumstances contemplated: *Lonegan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365. See, too, *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378; *Kelly, Mause & Co. v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971. The rule of damages in such cases is usually stated to be the difference between the contract price and the market value at the time and place of delivery: *Caldwell v. Reed*, Litt. Sel. Cas. 366, 12 Am. Dec. 314; *Fink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350; *McGrath v. G  gner*, 77 Md. 331, 39 Am. St. Rep. 415; *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297.

SPRAGUE v. NORTHERN PACIFIC RAILWAY CO.

[122 Wis. 509, 100 N. W. 842.]

EMINENT DOMAIN, Right to Dismiss or Withdraw from Proceedings, When Terminates.—A proceeding by a railroad company to condemn real property cannot be dismissed after the commissioners' report has been filed with the clerk of the court. (p. 1000.)

Proceedings to condemn land for the use of the Northern Pacific Railway Company. On November 21, 1903, the commissioners, at their final meeting, determined the value of the land to be taken and the damages to the adjoining land, and filed their report with the clerk of the circuit court. One month later, that court, upon application of the railway company, made ex parte, directed the entry of an order dismissing the proceedings. Subsequently the land owners appealed from the order of dismissal.

John Walsh, for the appellants.

Louis Hanitch, A. W. McLeod, C. W. Bunn and James B. Kerr, for the respondent.

510 SIEBECKER, J. The application of the respondent railway company for the dismissal of this condemnation pro-

ceeding represents that it has never taken possession of any part of the strip of land sought to be condemned, and that the value of the land and the amount of damages to adjoining land resulting from the condemnation exceed in amount any benefit to the public or petitioners for the use of the land as a right of way for a branch or spur track for railroad purposes, and that it deems it unwise and inexpedient to take the strip of land for these uses, and therefore asks that the proceeding be dismissed upon such terms as the court may find just to all parties interested in the proceeding.

511 The question is, Can a railroad corporation dismiss such a proceeding, instituted by it, against the protest of the land-owners, after the commissioners have filed their award with the clerk of the circuit court as prescribed by section 1848, Statutes of 1898? The nature of the proceeding is recognized in the statutes on the subject by providing that "the filing of such petition [for condemnation] shall be the commencement of a suit in said court": Stats. 1898, sec. 1846. The courts have held that these proceedings are governed by the law of procedure in actions. The rights of parties to such a proceeding become established in the law as in the ordinary form of suits between contending parties. Upon an appeal to this court from an order dismissing such proceeding prior to the filing of the commissioners' award, it was stated that: "The ordinary principle is that the moving party in actions or proceedings may, with the consent of the court, dismiss or discontinue the same before the result sought for in the proceedings has been reached and the rights of the parties fixed, and no reason is perceived why this principle should not apply here": *Milwaukee etc. Ry. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113.

In further consideration of such a right the court continued: "Certainly, if the proceedings cannot be stopped prior to the award, it would seem that they can never be stopped at all, because the statutory provisions as to the effect of the award upon the rights of the parties (Rev. Stats. 1878, sec. 1850) seem to preclude the idea of there being any stopping place after the filing of the award."

It is argued that the interpretation of the statute bearing upon the rights of the parties after the filing of the award was not included in the case then under consideration, nor in the cases therein referred to, and these expressions should, therefore, be treated as mere dicta in construing the statute. We cannot accede to this suggestion. The court was naturally led to con-

sider whether the proceedings had reached the ⁵¹² point where the rights of the parties had become fixed, and that is the question in the instant case. An examination of the authorities cited in the opinion, presented in support of the conclusions therein announced, supports the inference that the question now presented was deemed a pertinent consideration in deciding that case. While an interpretation on that question was not expressly required by the decision, it showed the views entertained by the court at that time, and is of persuasive force in construing the statute, and it should be followed unless it is found to be erroneous: *Buchner v. Chicago etc. Ry. Co.*, 60 Wis. 264, 19 N. W. 56; *Brown v. Chicago etc. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

All further consideration of the subject confirms us in the correctness of the conclusions therein expressed. The terms of the statutes clearly indicate that the filing of the report of the commissioners with the clerk of the circuit court of the county where the land is situated to be recorded by him in the judgment-book of such court is, in effect, a judgment in the proceeding, fixing the rights of the parties arising from the taking of the land under the right of eminent domain. After this step the land is treated by the statute in express terms as condemned, and the railroad corporation is entitled to "enter upon, take, and use the land for the purposes for which it was condemned," upon condition of paying the amount to the owners, or to the clerk of the court for the owners' use; and it may have a writ of assistance to secure possession in case the owners refuse voluntarily to yield possession. It is also provided, in case of no appeal, and in case of a neglect by the railroad corporation to pay the award, that the parties interested in the award may, upon motion, have execution for the amount due on the award. The provision that such execution shall not issue until the expiration of sixty days from the filing, and then only upon motion, in no way affects the rights fixed by the filing of the award.

It is the policy of the state, as evidenced by the statute, to ⁵¹³ give railroad corporations extensive powers for acquiring real estate for corporate uses, but such powers should be exercised in good faith on occasions when the interests of the public and of the corporations are to be promoted by it. It is upon these considerations that the right is granted to these corporations of taking all necessary real estate at its fair market value, regardless of the wishes of the owner who must yield to the necessities of the

public undertaking. If the right is asserted and established by the condemnation and prosecuted to the point of ascertaining the amount of the award, and the railroad company is permitted to elect to abandon the proceeding or not, after such award, upon the ground that it cannot secure the property at its own price, it might readily transpire that the owners would be subjected to many hardships and their rights might be seriously interfered with. We must hold that the proceeding cannot be dismissed after commissioners' report has been filed with the clerk of the circuit court: *Milwaukee etc. Ry. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113; *Uniacke v. Chicago etc. Ry. Co.*, 67 Wis. 108, 29 N. W. 899; *West v. Milwaukee etc. Ry. Co.*, 56 Wis. 318, 14 N. W. 292; *Morris v. Wisconsin etc. Ry. Co.*, 82 Wis. 541, 52 N. W. 758; *People ex rel. Yoder v. Highway Commrs.*, 188 Ill. 150, 58 N. E. 989; *Drath v. Burlington etc. R. R. Co.*, 15 Neb. 367, 18 N. W. 717; *Brown v. Chicago etc. Ry. Co.*, 64 Neb. 62, 89 N. W. 405.

We think that the commissioners fully complied with the statute, and that their report must be presumed to cover all the lands described in the petition and sought to be taken, with the improvements thereon.

By the Court. The order of the circuit court dismissing the proceeding is reversed, with directions to deny the application.

In Proceedings to Condemn Private Property for a public use, a corporation may be permitted to discontinue proceedings at any time before rights resulting therefrom have become vested in the property owners; and such rights are not vested until the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners for compensation: See the note to *In Matter of Water Commissioners*, 86 Am. Dec. 204.

THOMAS v. ASHLAND, SISKIWIT AND IRON RIVER LOGGING RAILWAY COMPANY.

[122 Wis. 519, 100 N. W. 993.]

NAVIGABLE WATERS.—Each Shore Owner, as Against the Others, is Entitled to his proportion of the line abutting navigable water for contact with navigation and to a direct course over intervening shallows, to construct piers and other structures connecting the shore with such navigable line. (p. 1004.)

NAVIGABLE WATERS—Rights of Shore Owners.—When the Irregularities or Curvatures of the Shore are Such that Lines cannot be Drawn at Right Angles to the Shore for the purpose of making

a proportional division of the navigable waters among the shore owners, then the whole cove is to be treated as a unit of the shore line by drawing perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of each so apportioned share of navigable water line to the respective termini of the corresponding shore line pertaining to each owner. The dominant rule is that each must have his due proportion of the line bounding navigability and a course of access to it exclusive of every other shore owner, and all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result. (p. 1004.)

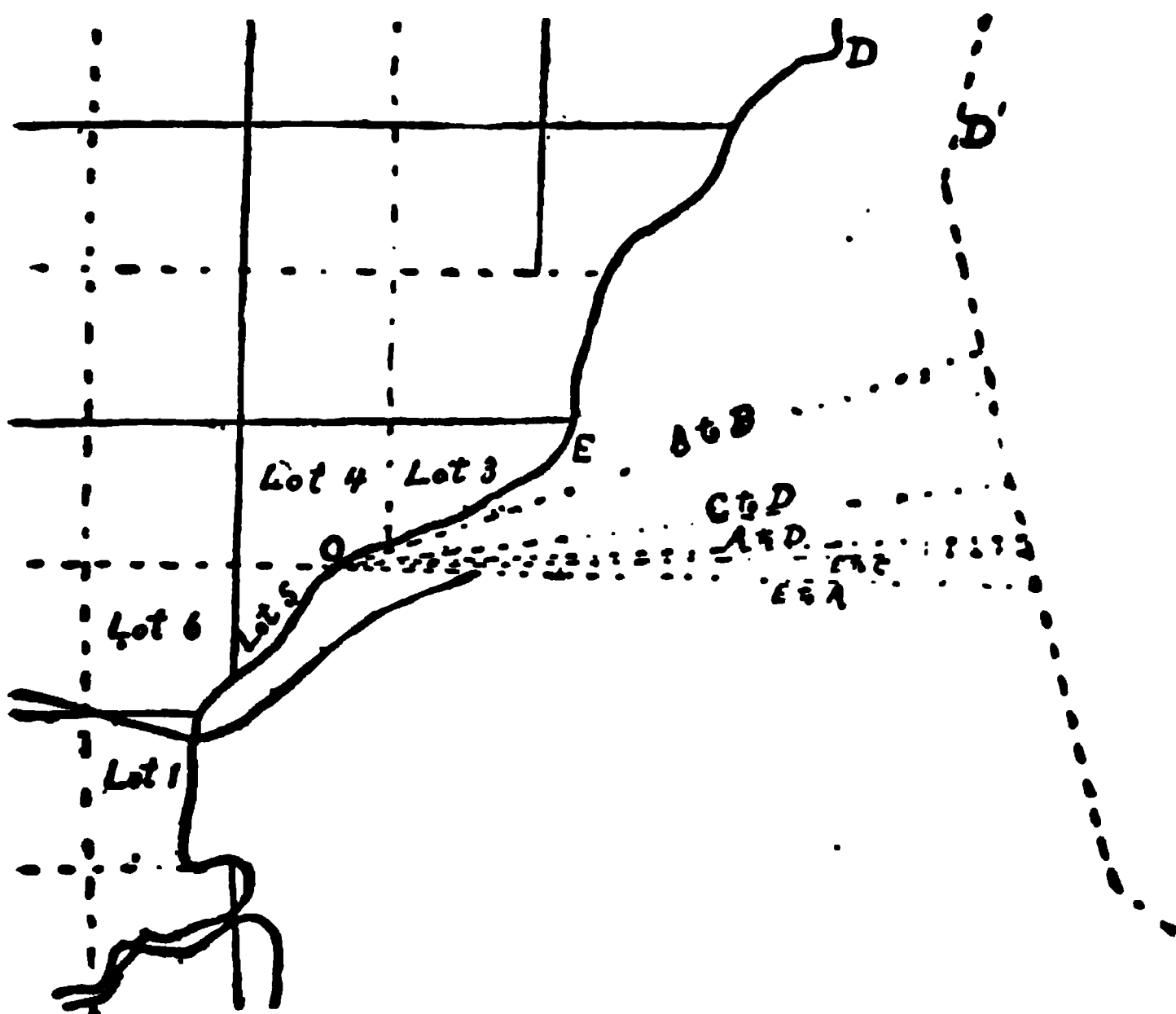
NAVIGABLE WATERS, Rights of Shore Owners.—No Departure will be Made from the Ordinary Method of Appointment and Delimitation by straight lines between adjoining shore owners, unless such variation or departure is necessary to substantial equality between them. (p. 1006.)

Action, the complaint in which alleged an interruption to plaintiff's access to navigable water by a pier, described therein, and prayed for its abatement. The plaintiff and defendant were coterminous owners of lands fronting upon the head of Chequamegon Bay at its westerly end. The following diagram from defendant's exhibit "B" shows the general shore line and also, by a dotted line, the limit of navigable water.



Lots 3 and 4 as designated on the plat belonged to plaintiff, and lots 1, 5 and 6 to the defendant. The pier complained of was about three thousand feet long and had been constructed by the defendant nearly parallel to the shore line, the terminus of which was almost exactly east of the point of division between the shore lines of the plaintiff and defendant. [See diagram on page 1001.]

Several surveyors were called and examined as witnesses on the trial of the action, and pointed out various lines drawn to apportion the shore line to the shore owners. The several points discussed as possible limits are marked on the plats as A, B, C, D and E, with the corresponding points to the navigable water line as A', B', C', D', E'. The surveyors attempted to apportion the space upon the navigable water line proportionate to the shore, first, upon the theory that the cove extended from A to B; secondly, from A to D; thirdly, from A to E; fourthly, from C to D; and fifthly, from C to E. Upon none of the theories thus testified to did the wharf invade plaintiff's line, except the theory that the cove was bounded by points A to E. If this theory were adopted, it would be impossible, according to the testimony, to give proportional access from all the shore line to the navigable water line. If the cove were deemed to extend from A to B, the north line limiting defendant's access to navigability would run along plaintiff's shore line several hundred feet, and prevent access therefrom to the water. The following diagram shows the course of dotted lines dividing the plaintiff's and the defendant's rights over the shallows according as the different points named may be adopted as the headlines or boundaries of the cove. The letters on each of these lines indicate the headlines from which it results.



The court made no finding, except that the wharf occasioned plaintiff no damage, and concluded, as a matter of law, that it was wholly within the lines of defendant's rights and outside those of plaintiff's, and a judgment was, therefore, entered dismissing the complaint.

The plaintiff appealed.

Tomkins, Tomkins & Garvin, for the appellant.

Lamoreux & Shea, for the respondent.

523 DODGE, J. Appellant's argument is apparently addressed not so much to anything which the court has adjudged as to the scheme of boundary lines contended for by certain surveyor witnesses. There is, however, nothing to indicate that the court adopted their views. Indeed, the court has made no finding of fact as to the location of lines separating plaintiff's rights of access to navigable water from those of defendant. The sole point adjudged is that defendant's pier, as now constructed, does not invade plaintiff's riparian rights. This may be true upon any of several theories as to where are the proper limits of this cove, or as to the proper manner of extending lines from shore boundaries to line of navigability.

The rules of law governing delimitation of rights of shore owners to use of shallows intervening between them and practically navigable water—especially in case of a cove or irregularity in the shore, or marked variation of the course of the shore line from the line of navigability—have recently been so clearly expressed in the now leading case of *Northern Pine L. Co. v. Bigelow*, 84 Wis. 166, 54 N. W. 496, 21 L. R. A. 776, that extended research for authority or discussion of the question would be work of supererogation. The rule there stated is to the effect that every shore owner, as against other owners, is entitled to his proportion of the line bounding navigable water for ⁵²⁴ contact with navigation, and to a direct course over intervening shallows to construct piers or other structures connecting the shore with such navigable line; that, when the irregularities or curvature of the shore are such that lines cannot be drawn at right angles to the shore to accomplish this, then the whole cove is to be treated as a unit of the shore line by drawing such perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of each so apportioned share of navigable water line to the respective termini of the corresponding shore line pertaining to each owner. But the dominant rule is that each must have his due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner, and that all rules for apportionment or diversion are subject to such modification as may be necessary to accomplish substantially this result: *Northern P. L. Co. v. Bigelow*, 84 Wis. 166, 54 N. W. 496, 21 L. R. A. 776; *Blodgett & D. L. Co. v. Peters*, 87 Mich. 498, 24 Am. St. Rep. 175, 49 N. W. 917; *Rust v. Boston M. Corp.*, 6 Pick. 158, 169; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Walker v. Boston & M. R. R.*, 3 Cush. 1, 24; *Tappan v. Boston W. P. Co.*, 157 Mass. 24, 29, 31 N. E. 703, 16 L. R. A. 353; *Elgin v. Beckwith*, 119 Ill. 367, 10 N. E. 558; 3 *Farnham on Waters*, 2471 et seq.

The surveyors expressed opinions in favor of the points A and B on accompanying first plat as the limits of the cove; conceding, however, that the angle of the shore line is more acute at either D or E than at B, and that the practical parallelism of navigability to shore line extends inward to C on the south and to D on the north, so that the cove, as indicated by a greater ex-

tent of shallow water, is more properly limited by the points C and D. It might well be conceded, as appellant contends, that the A to B theory of the cove limits could not be sustained by the court, for an apportionment ⁵²⁵ upon that theory would result in cutting off several hundred feet of plaintiff's shore line from any access at all to water, navigable or not, thus infringing the dominant rule above stated. But it appears that he can secure both access to and proportionate frontage on the navigable water by the method prescribed in the Bigelow case if either C and D or C and E are adopted as the cove limits, and that all other shore owners within the cove, so limited, can be protected in similar rights. It also appears without dispute that in either such case the defendant's wharf is wholly outside of the lines connecting plaintiff's shore with the line of navigability. Thus it appears that, unless some other plan is absolutely required by law, plaintiff's riparian rights are not invaded by defendant's structure, and the judgment merely dismissing the complaint is right ultimately, whatever may have been the reasons inducing it.

Some, though not very earnest, contention is made in favor of E and A as cove boundaries, from which would result a division line between plaintiff and defendant on which the wharf does infringe slightly; but to this arrangement there is the objection that no apportionment to all the shore owners is possible by straight lines, hence it is not to be adopted in presence of any other feasible theory.

Appellant also contends that the true cove is limited by the points E and G, but that lines bisecting the shore angle at each of these points would intersect before reaching navigable water, so that no navigable water line would exist for apportionment under the rule of the Bigelow case; hence he argues that a method should be adopted which has sometimes, *ex necessitate*, been applied to shut-in or bottle-shaped coves, where direct lines could not be drawn from all parts of the shore to navigable water. That method is to draw a base line across the entrance or mouth of the cove, apportion that base line proportionately among the shore owners, and then run lines from the termini of each owner's portion of the base line out ⁵²⁶ to the line of navigability, which is divided proportionately to the respective shares of the base line: *Rust v. Boston M. Corp.*, 6 Pick. 158, 168; *Walker v. Boston etc. R. R.*, 3 Cush. 1, 24; *Wonson v. Wonson*, 14 Allen, 71; *Tappan v. Boston W. P. Co.*, 157 Mass. 24, 29, 31 N. E. 703, 16 L. R. A. 353. While in some instances

it may be necessary to the protection of riparian owners' rights to depart from the method of apportionment and delimitation prescribed by the Bigelow case, we have no inclination to vary or obscure that rule, unless such variation is necessary to substantial equality. The evidence fails to show any such necessity here. By adopting either C and D, or A and D, or C and E as the limits of the cove, a substantially equitable apportionment can be made by the rule of that case. Besides, there is ● nothing in the testimony to warrant the view that G can with any propriety be considered a headland or terminus of this cove, while the maps in evidence indicate quite the converse. From them it appears to be the very center or head of the indentation into the shore.

We cannot avoid the conclusion that the record wholly fails to show that the trial court's decision was erroneous.

By the Court. Judgment affirmed.

Every Riparian or Littoral Owner has a right of access to the navigable waters in front of his land and a right to connect his land with such water by means of landings, wharves and piers: See the monographic note to Miller v. Mendenhall, 19 Am. St. Rep. 231; Taylor v. Commonwealth, 102 Va. 759, 102 Am. St. Rep. 865; San Francisco Sav. Union v. Petroleum etc. Co., 144 Cal. 134, 103 Am. St. Rep. 72, and cases cited in the cross-reference note thereto. Rules for apportioning the rights of neighboring littoral owners where the shore line is irregular are discussed in Blodgett etc. Lumber Co. v. Peters, 87 Mich. 498, 24 Am. St. Rep. 175. See, in this connection, Scheifert v. Briegel, 90 Minn. 125, 101 Am. St. Rep. 399.

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13. RAILROADS—Contract with Sleeping-car Company.—A railroad company is under no obligation to haul the cars of a sleeping-car company, and may when contracting to haul such cars, require the latter company to indemnify it against liability for personal injuries received by the sleeping-car company's employes. (Ill.) *Chicago etc. Ry. Co. v. Hamler*, 187.

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4. RIGHT OF PRIVACY—Waiver.—Any person who engages in any pursuit or occupation which calls for the approval or patronage of the public waives his right of privacy in so far that he thereby submits his private life to examination by those to whom he addresses his call, to any extent that may be necessary to determine whether it is wise, proper and expedient to accord to him, the approval and patronage which he seeks. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

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9. RIGHT OF PRIVACY.—Publication of one's picture without his consent for advertising purposes and for the gain of the advertiser is in no sense an exercise of the liberty of the press or of free speech. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

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COMMERCE.

1. TAXATION—Implements of Interstate Commerce.—Steamboats belonging to a corporation and used in transporting freight and passengers between different states, may be taxed in the state of incorporation, at the home port of the corporation, and their situs when at rest. (Tenn.) *Harrell v. Speed*, 814.

2. TAXATION—Implements of Interstate Commerce.—One state can neither impose a tax upon the capital stock of a corporation of another state, nor upon its boats engaged in interstate commerce, and making only temporary landing within the state, nor can it im-

pose a privilege tax for carrying on the business of such interstate commerce. (Tenn.) *Harrell v. Speed*, 814.

3. INTERSTATE COMMERCE—Intoxicating Liquors—Privilege Tax.—The imposition of a privilege tax for selling intoxicating liquors on steamboats engaged in interstate commerce while at landings within the jurisdiction of a state is a valid and proper exercise of its police power. (Tenn.) *Harrell v. Speed*, 814.

CONDITIONS.

See Deeds, 3, 4.

CONFLICT OF LAWS.

CONFLICT OF LAWS—Penal Statutes.—A statute of another state, penal in its character, has no extraterritorial force and will not be enforced in another state whose public policy is opposed to it. (Ill.) *Raisor v. Chicago etc. Ry. Co.*, 153.

See Death.

CONSPIRACY.

See Monopolies and Combinations.

CONSTITUTIONAL LAW.

In General.

1. THE PHRASES "Law of the Land" and "Due Process of Law" are identical in import. (Ind.) *McKinster v. Sager*, 268.

2. CONSTITUTIONAL LAW.—While the Statement of Principles Contained in a Declaration of Independence have not the force of organic law, yet it is always safe to read the letter of the constitution in the spirit of that declaration. (Ind.) *McKinster v. Sager*, 268.

3. CONSTITUTIONAL LAW—Fourteenth Amendment.—The guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising by any of its departments an arbitrary or capricious power over persons or property. (Ind.) *McKinster v. Sager*, 268.

4. CONSTITUTIONAL LAW—Limitations upon the Right to Change the Common Law.—The grant of legislative power implies the right to change the common law, particularly with reference to administrative and remedial processes, and, in many respects, uncontrollable discretion exists in the legislative departments to determine what is expedient; but in determining what constitutes due process of law and equality before the law, proper consideration must be given to the ancient landmarks which were established for the protection of private right. (Ind.) *McKinster v. Sager*, 268.

5. CONSTITUTIONAL LAW.—Every Partial or Private Law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional. (Ind.) *McKinster v. Sager*, 268.

Construction of Constitutions.

6. CONSTITUTIONAL LAW—Construction of Provisions Adopted from Other States.—Where a constitutional provision ap-

pears to have been in force in several states before it was adopted in this, it cannot be assumed to have been taken from the constitution of any one of such states for the purpose of applying the rule that when a constitution or statute, or any part thereof, is taken from another state, it will be deemed to have the meaning given to it by the courts of that state before it was adopted. (Ind.) *Voss v. Waterloo Water Co.*, 201.

7. **CONSTITUTIONAL and Statutory Law, Construction of.**—Courts should so construe all constitutional and statutory provisions as to suppress all evasions for the continuance of the mischief and as to defeat all attempts to avoid in an indirect and circuitous manner that which is prohibited. (Ind.) *Voss v. Waterloo Water Co.*, 201.

Personal Security and Liberty.

8. **CONSTITUTIONAL LAW.**—Personal Security as guaranteed by constitutional provisions includes not only the right to exist, but also the right of the individual to enjoy life in any way that may be agreeable and pleasant to him, according to his temperament and nature, provided he does not invade the rights of his neighbor or violate public law or policy. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

9. **CONSTITUTIONAL LAW.**—Personal Liberty includes, not only freedom from physical restraint, but also the right to live as one desires, whether a life of seclusion or of publicity, so long as he does not interfere with the rights of another or of the public. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

Impairment of Obligation.

10. **IMPAIRMENT OF OBLIGATION.**—If a Statute, in its application, is found to impair the obligation of a contract, it may be declared inoperative as to such contract, without holding it unconstitutional in other respects. (Iowa) *Brady v. Mattern*, 291.

11. **CONSTITUTIONAL LAW—Obligation of Contract.**—A Statute Extending the Time Within Redemption may be Made from Execution Sales, if applied to pre-existing judgments, diminishes the right of the creditor and creates a greater estate in the debtor. Its object is to give the latter greater rights than he had before, and this cannot be done without taking such rights from the creditor. (Cal.) *Welch v. Cross*, 63.

12. **CONSTITUTIONAL LAW—Obligation of Contracts.**—All the Laws of a State at the Time a Contract is Made which affect the rights of the parties thereto enter into and become a part of it as if referred to or incorporated therein. (Cal.) *Welch v. Cross*, 63.

13. **CONSTITUTIONAL LAW—Obligation of Contracts.**—The Remedy, Where It Affects Substantial Rights, is included within the term "obligation of contracts," and cannot be altered so as to materially impair that obligation. (Cal.) *Welch v. Cross*, 63.

14. **CONSTITUTIONAL LAW.**—In the Obligation of a Contract is Included the Means of Its Enforcement. (Cal.) *Welch v. Cross*, 63.

See Building and Loan Associations; Civil Rights; Divorce; Executions; Sales, 4.

CONTEMPT.*In General.*

1. **CONTEMPT—Libel of Judge—Adjournment of Court.**—The fact that a publisher erroneously thought that court had adjourned at the time of his publication of an insulting libel of the judge, or that such judge had in fact adjourned court at the time of such publication, is no defense for contempt of court in making such publication. (Va.) *Burdett v. Commonwealth*, 916.

2. **CONTEMPT—Power to Punish for.**—The power to punish for contempt of court is necessarily resident in, and to be exercised by, the court itself, and while the legislature may regulate, it cannot deprive courts of the power to summarily punish for contempts by providing for a jury trial in such case. (Va.) *Burdett v. Commonwealth*, 916.

3. **CONTEMPT—Libel upon Court Proceedings.**—Courts possess inherent power to punish, as for contempt, libelous publications upon their proceedings, pending or past, tending to degrade the tribunals, destroy public confidence and respect for their judgments, and to obstruct the free course of justice. (Va.) *Burdett v. Commonwealth*, 916.

4. **CONTEMPTS—Direct and Constructive.**—The substantial difference between a direct and a constructive contempt is one of procedure. Where the contempt is committed in the presence of the court, it may proceed upon its own knowledge of the facts and punish the offender without further proof, issue, or trial in any form, but in dealing with indirect contempts, not committed in the presence of the court, the offender must be brought before it, by rule or some other sufficient process. The power of the court to punish is the same in both cases. (Va.) *Burdett v. Commonwealth*, 916.

5. **CONTEMPT—Libelous Publication—Liberty of Press.**—Summary punishment as for contempt of the publisher of a libelous article directed against the court, is not an invasion of the liberty of the press, and it makes no difference whether such article refers to pending or past proceedings. (Va.) *Burdett v. Commonwealth*, 916.

6. **CONTEMPT—Liberty of Press.**—Any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them, but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is answerable. (Va.) *Burdett v. Commonwealth*, 916.

Costs.

7. **CONTEMPT—Costs in Proceedings to Punish.**—By the statutes of New York there is no authority to impose costs in proceedings to punish a criminal contempt. (N. Y.) *People v. Marr*, 562.

See Injunctions, 5.

CONTRACTS.*In General.*

1. **CONTRACTS—Promise to Assume Debt of Another.**—Where one for a sufficient consideration agrees to assume and pay the debt of another, the creditor is impliedly included as within the privity of

the promise, and he may single out the promisor and sue him by direct action, subject to all inherent equities arising out of the contract affecting the principal parties, one with the other. (Iowa) *Malanaphy v. Fuller etc. Mfg. Co.*, 332.

2. CONTRACTS—Parol Extension—Consideration.—The time for the performance of a written contract may be extended by parol, provided such extension is supported by some new and sufficient consideration. (Va.) *Cummins v. Beavers*, 881.

Failure to Read.

3. CONTRACTS.—Failure to read a contract before signing it does not affect its validity, if the person signing is able to read and write, and there was no fraud or misrepresentation. (Ill.) *Chicago etc. Ry. Co. v. Hamler*, 187.

Illegality.

4. ILLEGAL TRANSACTIONS—Relief of Parties.—If the parties to an illegal transaction are in particeps criminis, the law will aid neither to enforce the contract while executory, nor, where executed, will it aid either to place himself in statu quo by rescission, but will, in both cases, leave the parties where it found them. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

5. ILLEGAL TRANSACTION—Recovering Back Money.—So long as illegal transactions remain wholly unexecuted, the one parting with his money may repent, abandon his contract, and recover back the money paid. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

Duress.

6. DURESS is a Species of Fraud in which compulsion in some form takes the place of deception in accomplishing an injury, and is either of the person or of the goods of the party. (Iowa) *Foote v. De Poy*, 365.

7. DURESS of Property, Agreement, When may be Avoided for.—Where an aged person is very much weakened in body and mind and is under guardianship, and his wife, by holding the guardianship over him in terrorum, obtains an agreement which is essentially unconscionable, whereby a trustee is to be appointed for him to whom certain moneys are to be paid and lands conveyed for the use of a minor child, the money and property thus surrendered constituting the larger part of the father's estate, the transaction will be regarded as the result of duress, and set aside in equity, at the suit of his other heirs, commenced after his death. (Iowa) *Foote v. De Poy*, 365.

8. DURESS, Order of Court Approving Contract Procured by.—Where a contract is procured under circumstances which entitle the person from whom it is procured to be relieved therefrom for duress, he being already under guardianship, an order of court approving the contract can have no effect in the premises. (Iowa) *Foote v. De Poy*, 365.

CORPORATIONS.

Miscellaneous.

1. PLEADING CORPORATE EXISTENCE — Demurrer.—The point that the plaintiff is not a corporation goes only to its capacity to maintain the action, and cannot be raised by general demurrer, but only by special demurrer, on the ground that the plaintiff has no capacity to sue, and not then, unless such want of capacity appears affirmatively on the face of the complaint. (Cal.) *Los Angeles Ry. Co. v. Davis*, 210.

2. CORPORATION, Books of, When not Admissible as Evidence.—On the trial of an officer of a corporation on a charge of embezzlement, entries in its books made by clerks in the course of their employment, but without his direction or knowledge, are not admissible. (Iowa) *State v. Carmean*, 352.

3. CORPORATIONS—Attacking Validity of.—An answer setting up the invalidity of the contract in suit entered into between defendant and a corporation to whose interest plaintiff had succeeded, and which was organized to carry out that and similar contracts, is not subject to the objection of attempting to collaterally attack the validity of the corporate charter. (Mo.) *Finck v. Schneider Granite Co.*, 452.

4. CORPORATIONS.—The Statute of Limitations runs against an action brought by a stockholder for the conversion of corporate property the same as it would if the action had been brought by the corporation itself. (Mich.) *Bates v. Boyce's Estate*, 402.

Negotiable Paper.

5. CORPORATIONS—Transfer of Negotiable Paper—Notice.—Although the president and the cashier are officers and stockholders in another corporation, which is the payee of a note transferred to the bank, the bank is not charged with constructive notice of defenses of the maker against such payee, of which neither of such officers had actual notice. (S. Dak.) *Iowa Nat. Bank v. Sherman*, 778.

6. CORPORATIONS—Transfer of Notes by President.—The president of a manufacturing corporation, which receives, in the usual course of business, notes for its products, is presumed to have authority to transfer by indorsement a note made payable to such corporation. (S. Dak.) *Iowa Nat. Bank v. Sherman*, 778.

Ultra Vires and Estoppel.

7. CORPORATIONS—Estoppel.—If a corporation acts within the general scope of the powers conferred upon it by the legislature, it, as well as all persons contracting with it, will be estopped to deny that it has complied with the legal formalities requisite to its existence or to its action. (Ill.) *Steele v. Fraternal Tribunes*, 160.

8. CORPORATIONS—Contracts Ultra Vires—Estoppel.—If a contract made by a corporation is beyond the powers conferred upon it by existing laws, neither the corporation nor a party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws. (Ill.) *Steele v. Fraternal Tribunes*, 160.

9. CORPORATIONS—Notice of Powers.—A person dealing with a corporation having limited and delegated powers, is chargeable with notice of those powers and their limitations, and cannot plead his ignorance of their existence. (Ill.) *Steele v. Fraternal Tribunes*, 160.

10. CORPORATIONS.—Contracts Ultra Vires made with or by a corporation are wholly void and of no legal effect, and cannot be ratified. (Ill.) *Steele v. Fraternal Tribunes*, 160.

Transactions Between Director and Stockholders.

11. CORPORATIONS—Officers as Trustees.—Officers of a corporation occupy the position of trustees for the stockholders as a body, with respect to the business and property of the corporation, and cannot have or acquire any personal or pecuniary interest in con-

dict with their duties as such trustees. (Ill.) *Hooker v. Midland Steel Co.*, 170.

12. CORPORATIONS—Director and Stockholder—Purchase of Stock.—A director in a corporation does not sustain the relation of trustee to an individual stockholder with respect to his stock, over which the former has no control, and he may purchase such stock practically on the same terms as a stranger. (Ill.) *Hooker v. Midland Steel Co.*, 170.

13. CORPORATIONS—Director and Stockholder—Purchase of Stock.—In the absence of actual fraud the purchase by a director of the stock of an individual stockholder will not be set aside for a mere failure to disclose any information the director may have affecting the value of the stock. (Ill.) *Hooker v. Midland Steel Co.*, 170.

Crimes of Officers.

14. CORPORATION, Embezzlement of Officer of.—An officer of a corporation cannot be guilty of embezzlement of funds intrusted to it when he did not receive such funds, nor have any knowledge of their misappropriation, nor intentionally failed to apply them to the purposes for which they were received. (Iowa) *State v. Carmean*, 352.

15. CORPORATIONS, Civil and Criminal Liability of Officers of.—To a Third Person who intrusts his money to a corporation, its officers are not liable civilly nor criminally, unless, by some act or neglect on their part, the money is lost or misappropriated. (Iowa) *State v. Carmean*, 352.

16. CORPORATIONS, Criminal Liability of Officers of.—One Officer of a Corporation is not Criminally Liable for the Acts of Another, nor for the acts of subordinates, unless such acts are by his direct authority and in the execution of a criminal purpose on his part. (Iowa) *State v. Carmean*, 352.

17. CORPORATIONS, Criminal Liability of Officers of for Fraudulent Misappropriation of Moneys.—Before an officer of a corporation can be held criminally liable for so planning and conducting its business as to result in a fraudulent misappropriation or conversion of the moneys of a third person intrusted to it, it must be shown that such course of business was either in its essential characteristics illegal and devised and carried on for purposes having a criminal result, or that, with his knowledge and under his direction, it was so carried on in the particular case as to effect such result. (Iowa) *State v. Carmean*, 352.

Lien on Stock.

18. CORPORATIONS, Lien of on Shares of Stock.—At the common law a corporation had no lien upon the shares of its stockholders for debts due from them to it. (Iowa) *Dempster Mfg. Co. v. Downs*, 340.

19. CORPORATIONS, Lien of on Stock.—By Its Articles of Incorporation a corporation may reserve a lien in its favor on all shares of its stock for the holder's liability to it, and such lien is enforceable against a transferee of stock without actual notice of the indebtedness or the contents of such articles. (Iowa) *Dempster Mfg. Co. v. Downs*, 340.

Stock Subscriptions.

20. CORPORATIONS—Stock Subscriptions, Suits in Equity to Enforce.—A creditor of a corporation may maintain a suit in equity

to recover against stockholders of an insolvent corporation an unpaid balance of a stock subscription. (Or.) *Macbeth v. Banfield*, 670.

21. CORPORATION—Stock Subscription, Payment in Property, Creditors, When Entitled to Relief Against.—If a stock in a creamery corporation is issued as fully paid up for a sum double the value of the property transferred to such corporation by its stockholders, and double the value which they had placed upon it in transactions between themselves prior to the formation of the corporation, the act of the directors in issuing it must be deemed fraudulent as to creditors, and they may in equity compel the stockholders to pay in as upon their subscription the difference between the value of the property received by the corporation and the par value of the stock. (Or.) *Macbeth v. Banfield*, 670.

22. CORPORATION—Stock Subscription, Payment of in Property.—The directors of a corporation may receive property in payment for stock in any case in which they are authorized under the charter or articles of incorporation to purchase for the benefit of the corporation and to subserve the purposes for which it was organized. (Or.) *Macbeth v. Banfield*, 670.

23. CORPORATIONS—Stock Subscription, Payment of in Property, What Must be the Value of.—If a liability for a stock subscription is to be discharged in property, it must measure up to the money value. In other words, the value of the property must be equivalent to the amount of the subscription. (Or.) *Macbeth v. Banfield*, 670.

24. CORPORATION—Stock Subscription, Payment in Property, When Deemed Fraudulent as to Creditors.—The payment of a stock subscription in property cannot be sustained merely on the ground that the directors acted in good faith or were not guilty of actual fraud. If property whose value is well known, or can easily be learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith and is made for a fraudulent purpose. This presumption becomes conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that a fraudulent intent appears on its face and is not explained, the court will hold it to be fraudulent as a matter of law. (Or.) *Macbeth v. Banfield*, 670.

25. CORPORATION—Stock Subscription, Payment in Property, Fraud in, When Must be Affirmatively Proved.—If the nature of the property and the extent of the valuation are such that the excess valuation may have possibly been due to error in honest conviction or judgment, then, to render the transaction invalid, actual fraud must be shown. The real question in cases of this character is whether the property was taken at a high valuation with the fraudulent intent of evading the plain mandate of the law. (Or.) *Macbeth v. Banfield*, 670.

26. CORPORATION—Stock Subscription, Payment in Property at an Overvaluation, Remedy for.—When stock is issued for property taken at an overvaluation, it is competent to compel the stockholders to respond for the difference between the actual value of such property and the par value of the stock. (Or.) *Macbeth v. Banfield*, 670.

Foreign Corporations—Stockholders' Liability.

27. CORPORATIONS—Foreign—Right to do Business in State—Presumption.—If failure of a foreign corporation to comply with the

statute relating to the transaction by it, of business within the state, is relied upon as a defense, and such failure does not appear, on the face of the complaint, it must be presumed that such corporation has complied with the statute, and the burden is on the defendant to plead and prove his defense. (Minn.) Lehigh Valley Coal Co. v. Gilmore, 443.

28. FOREIGN CORPORATION—Stockholders' Liability.—An Action to enforce a stockholder's liability to contribute proportionally with other stockholders to a fund to pay the debts of the corporation, must ordinarily be brought in the state where the corporation is located, since there only can its obligations be ascertained, its officers controlled, and its assets marshaled. (R. I.) Miller v. Smith, 699. .

29. FOREIGN CORPORATION—Stockholders' Liability.—Proceedings to enforce the proportionate liability of stockholders in other states cannot be equitably taken until such liability has been ascertained in the state of the domicile of the corporation. (R. I.) Miller v. Smith, 699.

30. FOREIGN CORPORATION—Stockholders' Liability.—Where the obligation of a stockholder is secondary to that of the corporation and proportional to that of other stockholders, it will not be enforced in other states, unless the equities between all stockholders and all creditors can be administered. (R. I.) Miller v. Smith, 699.

See Creditors' Bills; Railroads; Receivers.

COSTS.

See Attorney and Client, 3; Contempt, 7.

COTENANCY.

See Tenancy in Common.

COURTS.

1. JURISDICTION of the Subject Matter, When Open to Inquiry.—Where the question upon which jurisdiction depends is one of law purely, jurisdiction over the subject matter is always open to collateral inquiry. (Cal.) Grannis v. Superior Court, 23.

2. A PROBATE COURT is a Court of Limited Jurisdiction in Rhode Island. (R. I.) Providence County Sav. Bank v. Hughes, 682.

3. PROBATE COURT—Presumption of Jurisdiction.—The presumptions which, under the Rhode Island statutes, attach to the judgments of probate courts, are, at most, only equal to those which attach to the judgments of superior courts. (R. I.) Providence County Sav. Bank v. Hughes, 682.

CREDITORS' BILLS.

1. CREDITORS' BILLS—Corporations—Actions for Torts.—Claims against a corporation based on unliquidated damages for torts alleged to have been committed by it cannot, standing alone, form any basis for a creditor's bill against such corporation. (Tenn.) Slover v. Coal Creek Coal Co., 851.

2. CREDITORS' BILLS—Corporations.—A bill quia timet cannot be maintained against a corporation having a large number of damage suits commenced against it, to place its assets in the hands

of a receiver to be by him preserved for the benefit of the persons who may be successful in such suits. (Tenn.) *Slover v. Coal Creek Coal Co.*, 851.

3. CREDITORS' BILLS—Corporations—Action for Torts.—A bill *quia timet* will not lie against a corporation to impound its property at the suit of one who has brought actions for damages against it on the ground that he fears that other judgments will be obtained and executions issue, which will exhaust the assets of the corporation before he can secure his judgment, or that the assets of the corporation will be otherwise dissipated before such time. (Tenn.) *Slover v. Coal Creek Coal Co.*, 851.

CRIMINAL LAW.

1. CRIMINAL LAW, Evidence of Other Crimes.—Evidence with reference to other transactions, though criminal, cannot be received unless they tend to establish the criminal intent of the accused with reference to the crime charged against him. (Iowa) *State v. Carmean*, 352.

2. CRIMINAL PROSECUTIONS, Evidence of Other Transactions, When Inadmissible.—In the prosecution of an officer of a corporation for the embezzlement of money intrusted to it, evidence for the purpose of showing the general course of business carried on under his direction, consisting of the discounting of notes and the use of accommodation paper, is inadmissible where there is no claim that these transactions were unlawful, nor that the purpose of carrying them on was the misappropriation of money. (Iowa) *State v. Carmean*, 352.

Note.

Criminal Law, coercion as an excuse for crime, what amounts to, 723.

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coercion as an excuse or defense in prosecutions for murder or manslaughter, 722, 723.

coercion as an excuse or defense in prosecutions for robbery, 721.

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threats previously made cannot excuse crime, 725.

CURTESY.

DEED to Married Woman—Estate by Curtesy.—A conveyance of land by a third person to a married woman, to be held by her as her separate estate, with full power of disposition, does not deprive her husband of an estate by curtesy therein after her death. (Tenn.) *Bingham v. Willer*, 803.

CUSTOM AND USAGE.

THE MEANING OF THE LANGUAGE Used in a Contract can be Shown by Custom only when it is ambiguous. (Wis.) *Vogt v. Schienebeck*, 989.

See Death; Master and Servant, 2; Sales, 5, 6.

Note.

Damages. See Vendor and Purchaser.

DEATH.

1. **DEATH—Construction of Statutes Giving Action for.**—The North Carolina act of 1897, giving to railroad employes and their representatives a remedy for injuries or death caused by defects in appliance, or the negligence of fellow-servants, is intended merely to enlarge the Lord Campbell act of that state, and the two should be construed together. (S. C.) *Dennis v. Atlantic Coast Line R. R. Co.*, 746.

2. **DEATH—Action for Causing—Conflict of Laws.**—When a liability for causing the death of a person is enforced in a jurisdiction other than the place of the wrongful act, it does not mean that the act in any degree is subject to the *lex fori*, with regard either to its quality or its consequences. (S. C.) *Dennis v. Atlantic Coast Line R. R. Co.*, 746.

3. **DEATH—Action for Causing—Conflict of Laws.**—An action in South Carolina for a wrongful death occasioned in North Carolina is encumbered with all the burdens arising out of the statutes of the latter state, which create the right of action. (S. C.) *Dennis v. Atlantic Coast Line R. R. Co.*, 746.

4. **DEATH—Limitation of Action for—Conflict of Laws.**—The requirement of the statutes of North Carolina that an action for wrongful death must be brought within one year, is not a statute of limitations; a failure to commence an action in that state within that time extinguishes not only the remedy, but the right, so that thereafter an action cannot be maintained in South Carolina. (S. C.) *Dennis v. Atlantic Coast Line R. R. Co.*, 746.

5. **CONFLICT OF LAWS—Penal Statutes—Damages for Causing Death.**—A statute of another state permitting the recovery of a fixed sum for the negligent killing of a person without proof that plaintiff has sustained any damage, is penal in its character, and if opposed to the public policy of another state will not be enforced therein. (Ill.) *Raisor v. Chicago etc. Ry. Co.*, 153.

6. **DEATH OF HUMAN BEING, Action for by Resident of Another State.**—Under a statute creating a liability for the killing of a human being by willful act, neglect, or default, a recovery may be had, though the person killed and the person in whose behalf the recovery is sought were residents of another state. (Wis.) *Robertson v. Chicago etc. Ry. Co.*, 925.

7. **EXECUTORS AND ADMINISTRATORS—Foreign Administrator, When may Sue.**—An action may be maintained by an administrator appointed in another state to recover for the negligent killing of his intestate in this state, such appointment having been made at the domicile of the decedent. (Wis.) *Robertson v. Chicago etc. Ry. Co.*, 925.

8. **DEATH.—A Statute Giving a Remedy for an Injury causing death** is not penal in its nature, and therefore is not limited, as to

the remedy it affords, to the state of its enactment. (Iowa) *Romano v. Capital City Brick etc. Co.*, 323.

9. DEATH—Nonresident Aliens.—An Administrator appointed in Iowa may maintain an action in that state for an injury resulting in death to a resident alien, though it affirmatively appears that the intestate's sole heir is a nonresident alien. (Iowa) *Romano v. Capital City Brick etc. Co.*, 323.

DEEDS.

In General.

1. DEEDS—Want of Consideration.—No consideration is necessary in order to give validity to a deed as between the parties or third persons having notice. (S. Dak.) *Bernardy v. Colonial etc. Mortgage Co.*, 791.

2. DEEDS—After-acquired Title.—Under a statute declaring that when a person purports, by a proper instrument, to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors, if an entryman on public land conveys it in fee simple before a patent is issued, on the subsequent issuance of the patent to the grantor, the fee passes to the grantee in the deed. (S. Dak.) *Bernardy v. Colonial etc. Mortgage Co.*, 791.

Condition Subsequent.

3. DEEDS—Condition Subsequent.—A deed will not be construed to create a conditional estate unless the language used unequivocally indicates an intention upon the part of the grantor to that effect. (S. Dak.) *Huron v. Wilcox*, 788.

4. DEED TO CITY—Interest Transferred—Condition Subsequent.—A purchase by, and deed to, a city of land, the city having power to purchase and hold land for its own use, vests an absolute title to the land in the city, although the deed recites that it is "understood" that the land is granted to the city, "for city hall purposes only." (S. Dak.) *Huron v. Wilcox*, 788.

Delivery After Death.

5. DEED FOR SUPPORT OF GRANTOR—Delivery After Death. If a deed is deposited with a third person to be delivered after the grantor's death, and recites that the grantee, as part of the consideration, shall live with and care for the grantor until his death, the grantee is not entitled to a delivery if she fails to perform the condition of living with and caring for the grantor. (Mich.) *Culy v. Upham*, 388.

6. DEED—Delivery After Death—Statute of Frauds.—A verbal direction by a grantor that his deed, which he deposits with a third person, shall be delivered upon his death, if it amounts to a modification of the written conditions of the deed, is ineffectual under the statute of frauds. (Mich.) *Culy v. Upham*, 388.

Testamentary Instrument.

7. DEED—Testamentary Instrument.—If the grantor in an instrument purporting to be a deed intends that title shall remain in him until his death, and then pass to the grantee if she has performed the conditions recited therein, his intent is testamentary in character and cannot be consummated by a deed. (Mich.) *Culy v. Upham*, 388.

See Husband and Wife; Vendor and Vendee.

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Deputy. See Officers.

DESCENT AND DISTRIBUTION.

1. ESTATES OF DECEDENTS—Voluntary Division by Heirs.—Where the interests of creditors are not involved, heirs may agree upon a division of the estate, or they may adopt and make valid a distribution under what would have been void as a judicial proceeding, such as an irregular report of appraisers appointed to distribute the estate. (Ga.) *Williams v. Williams Co.*, 100.

2. ESTATES OF DECEDENTS—Voluntary Division by Heirs.—Where a consent division of an estate has been made by the heirs, each heir, without further conveyance, acquires a perfect equity in the property set apart to him, and loses all interest in that assigned to the other distributees. (Ga.) *Williams v. Williams Co.*, 100.

See Public Lands, 5.

DIVORCE.

1. CONSTITUTIONAL LAW—Divorce, Statute Denying Right for One Year to Enter a Final Decree of.—Though the constitution confers jurisdiction on the superior courts over actions for divorce, a statute requiring the court in such actions, if it finds the party entitled to a divorce, to enter a decree so declaring, but not to enter final judgment until one year after the entry of the interlocutory decree, is not unconstitutional. (Cal.) *Grannis v. Superior Court*, 23.

2. JUDGMENT of Divorce, Motion to Vacate by Striking a Void Provision from.—Where a decree is void in so far as it purports to grant an immediate divorce, the court may, at any time, on its own motion or the motion of either party, so declare, and may modify such decree by striking the void provision therefrom. (Cal.) *Grannis v. Superior Court*, 23.

3. JUDGMENT of Divorce, When Void.—If a statute provides that a court in actions for divorce must, after the trial thereof, file its decision and conclusions of law, and, if it determines that a divorce ought to be granted, must enter an interlocutory judgment declaring that the party in whose favor the court decides is entitled to a divorce, and that one year after such interlocutory judgment is entered, the court may, on motion of either party, or upon its own motion, enter a final judgment granting the divorce, a judgment entered in the first instance granting an absolute and immediate divorce is not erroneous merely, but is beyond the jurisdiction of the court, and void. (Cal.) *Grannis v. Superior Court*, 23.

4. DIVORCE—Jurisdiction to Decree Alimony.—Service upon defendant in a suit for divorce of a copy of the complaint and notice of the commencement of the action, made at his residence in another state, does not, in the absence of his personal appearance, give the court of yet another state jurisdiction to decree payment of alimony and counsel fees by him on granting the divorce. (Ill.) *Proctor v. Proctor*, 168.

5. DIVORCE—Extraterritorial Effect of Decree—Proceeding in Rem.—A default divorce decree purporting to vest in complainant an interest in real estate of the defendant situated in another state is in that respect extraterritorial, without jurisdiction, and void. (Ill.) *Proctor v. Proctor*, 168.

6. A DECREE FOR ALIMONY does not Become Dormant, in Ohio, when no execution has been sued out thereon within five years. (Ohio St.) *Lemert v. Lemert*, 621.

DOWER.

1. DOWER—Conveyance of.—A deed signed by a married woman and a court commissioner conveying her husband's real estate, to which he is not a party, is ineffectual to bar her right of dower, under a statute providing that such right is barred, "when a husband and his wife" have signed a writing purporting to convey his real estate. (Va.) *Lewis v. Apperson*, 903.

2. DOWER can be Defeated or Barred only in some of the modes pointed out by law. (Va.) *Lewis v. Apperson*, 903.

3. DOWER—Conveyance of—Estoppel.—Where a deed of a married woman of her dower fails as a conveyance from the nonconcurrence of her husband, it is ineffectual for all purposes, and cannot be relied upon as an estoppel or ground of recovery in a subsequent controversy. (Va.) *Lewis v. Apperson*, 903.

4. DOWER—Estoppel—Burden of Proof.—If it is claimed that a married woman is barred of her right of dower by her conduct in connection with her execution of a deed of her husband's lands to which he was not a party, the burden of proof is on the person asserting the estoppel to prove all of the elements necessary to establish it. (Va.) *Lewis v. Apperson*, 903.

DURESS.

See Contracts, 6-8.

ELECTRICITY.

1. NEGLIGENCE—Electric Wires.—Evidence that electric wires carrying a high voltage were strung on the same cross arm, sixteen inches apart, upon poles one hundred feet apart, that they had been crossed two weeks before, and again shortly after the accident, that they were permitted to sag four feet between each pole, and that the insulating material was worn off at the point of contact, is sufficient to show negligence in the stringing and maintenance of the wires. (Minn.) *Gilbert v. Duluth General Elec. Co.*, 430.

2. NEGLIGENCE.—Electric Companies are Bound to Use Reasonable Care in the construction and maintenance of their lines and apparatus. Such care varies with the danger which would be incurred by negligence. In cases where the wires carry dangerous currents of electricity, and the result of negligence may be exposure to death or serious accident, the reasonable care required is the highest degree of care. (Minn.) *Gilbert v. Duluth General Elec. Co.*, 430.

3. NEGLIGENCE—Electricity.—A person who constructs electric fixtures in his house is not bound to anticipate negligence on the part of an electric company in the construction and maintenance of its wires which connect with such fixtures. In such case he is not guilty of contributory negligence in installing a defective electric

light socket in his residence. (Minn.) *Gilbert v. Duluth General Elec. Co.*, 430.

4. **ELECTRIC CORPORATIONS, Liability of for Acts of Others.** Where electric appliances are placed on the poles of a telephone corporation without its consent, but remain there more than a year, it must be deemed to acquiesce, and is hence liable to its employes for injuries due thereto. (Iowa) *Barto v. Iowa Tel. Co.*, 347.

5. **TELEPHONE CORPORATIONS—Risks not Assumed by Employes.**—A telephone corporation does not assume the risk of coming in contact with any live wire which, in the exercise of ordinary diligence, he does not observe. He is not an inspector, and where there is nothing to show that inspection was a part of his duty, he does not assume the risks of dangers which inspection would have exposed. (Iowa) *Barto v. Iowa Tel. Co.*, 347.

6. **ELECTRIC CORPORATIONS, Duty of to Employes.**—The duty of providing a reasonably safe place in which to work is an affirmative and continuing duty on the part of an employer, and if a telephone corporation allows an electric light company to use its poles, it must see that they are so used as not to expose employes to perils, the risks of which are not assumed on entering the employment. (Iowa) *Barto v. Iowa Tel. Co.*, 347.

7. **ELECTRICITY, Care Required in the Use of.**—Electricity, unless properly handled, is exceedingly dangerous, and those utilizing its agencies cannot complain if a degree of care and skill in the construction and maintenance of the necessary appliances and machinery is exacted commensurate with the dangers involved. (Iowa) *Barto v. Iowa Tel. Co.*, 347.

8. **A TELEPHONE CORPORATION Must be Presumed to have Known** what everyone else has observed that linemen, in going up and down poles, take hold of braces and other projections which do not appear to be dangerous, and the corporation in placing wires and apparatus on those poles must take this custom into consideration in guarding against exposing its employes to unnecessary peril. (Iowa) *Barto v. Iowa Tel. Co.*, 347.

9. **ELECTRIC LIGHT—Negligent Location in Street.**—An electric lighting company cannot be charged with negligence in maintaining a light in the street at a point designated by the city government. (R. I.) *Nelson v. Narragansett Elec. etc. Co.*, 711.

EMBEZZLEMENT.

1. **EMBEZZLEMENT, as Generally Defined in the Statutes, Consists** of the fraudulent conversion or misappropriation of property received in a fiduciary capacity. (Iowa) *State v. Carmean*, 352.

2. **EMBEZZLEMENT, Value of Property Misappropriated.**—In a prosecution for embezzlement under the statutes of Iowa, the jury should find the value of the property misappropriated. (Iowa) *State v. Carmean*, 352.

3. **EMBEZZLEMENT.**—A Criminal Intent must be shown to sustain a conviction for embezzlement. (Iowa) *State v. Carmean*, 352.

4. **EMBEZZLEMENT Without Criminal Intent.**—An instruction, where an officer of a corporation was on trial accused of embezzlement, that the fraudulent conversion of property or money of another is the voluntary commission of an act the inevitable effect of which is to deprive the true owner of his money or property, and that a criminal intent may be inferred from the commission of such an act,

and if the defendant had knowledge of the fact or means of knowing from the manner in which the business of the corporation was done or his books kept, that such system of business inaugurated by him and pursued under his direction would result in the money of third persons being improperly applied and thereby lost to them, that he would be guilty of the crime charged, is erroneous, because it tends to sanction a conviction for a crime without any evidence, either of a criminal act or criminal intent on the part of the accused. (Iowa) *State v. Carmean*, 352.

See Corporations, 14-17.

EMINENT DOMAIN.

In General.

1. **EMINENT DOMAIN—Railroad, Property and Estates Which may be Taken for.**—In condemning a right of way for a railway, no more land and no greater interest in it can be taken by the company than the public use requires, which is ordinarily the surface of the land. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

2. **EMINENT DOMAIN—Necessity of Taking a Particular Tract.** While a corporation has a primary discretion in determining what land it is necessary to appropriate in the exercise of its power of eminent domain, the probate judge has authority to prevent an abuse of such power, where the statute vests him with jurisdiction to determine the necessity in general of making an appropriation; and the law thus affording an adequate remedy, equity will not restrain the condemnation of a particular tract. (Ohio St.) *Wheeling etc. R. R. Co. v. Toledo Ry. etc. Co.*, 622.

3. **EMINENT DOMAIN—Taking of Property.**—A taking of private property for public use requiring just compensation to be made therefor, exists when the property is actually appropriated by the state or one of its agencies, or the common and necessary use of the property is seriously interrupted. (Tenn.) *Barron v. Memphis*, 810.

4. **EMINENT DOMAIN—Taking of Property.**—If a municipal corporation enlarges a pier supporting one of its bridges to enable the pier to bear the additional weight of a city sewer, and thereby diverts the current of the stream, so as to overflow and destroy private property and undermine the support of a house standing thereon, there is such a taking of private property for a public use as to require just compensation to be made therefor. (Tenn.) *Barron v. Memphis*, 810.

Compensation and Damages.

5. **CONSTITUTIONAL LAW—Eminent Domain.**—The legislature has no power to authorize the taking of private property for a public use without just compensation. (Tenn.) *Barron v. Memphis*, 810.

6. **EMINENT DOMAIN—Damages, When the Same as if the Fee were Taken.**—Ordinarily, when land is sought to be taken as a right of way for a railway, though nothing but the easement is to be acquired, the damages are practically the same as if the fee were taken, and when such is the case, the law requires the condemning corporation to pay the value of the fee as the measure of damages sustained. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

7. **EMINENT DOMAIN—Damages, When do not Extend to the Whole of the Fee.**—When it can be shown that the fee burdened by the easement is of some substantial value to the owner, this must

be taken into consideration in determining the damages to be awarded for the imposition of an easement on the land, and the value of the fee cannot be said to constitute the measure of such damages. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

Mineral and Oil Lands.

8. **EMINENT DOMAIN—Minerals in Land, Right to.**—Whatever minerals lie beneath the right of way to lands acquired by a railroad company in proceedings in the exercise of the right of eminent domain are reserved to the owner, and he may by drifts from tunnels sunk on his adjoining land, provided he leaves a sufficient support for the easement of the railway company, take out all minerals beneath its right of way. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

9. **EMINENT DOMAIN—Oil Lands, Damages for Right of Way for Railway Across.**—By proceedings in the exercise of the right of eminent domain to acquire a right of way for a railway, the owner of the land does not lose, and the company does not acquire, the right to oil beneath the surface. This interest, which remains in the owner, must be considered in determining his damages, and if, by putting down wells on the adjoining land, he can draw out the oil beneath the surface of the right of way, this fact must be considered in determining his damages, and such damages cannot be the same as if by the proceeding the company acquired the fee. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

10. **EMINENT DOMAIN—Right Remaining in the Land Owner Respecting Oil Beneath the Surface.**—The interest reserved to the owner of the fee where a right of way is acquired by condemnation over his land in petroleum beneath the surface is in all respects the same as if he had made a grant or lease of a portion of the surface, reserving to himself as owner of adjoining land the right to all minerals beneath the granted or leased tract, but without the right to enter on the surface to sink wells. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

11. **EMINENT DOMAIN—Damage for Easement Over Oil-bearing Lands.**—The rule pertaining to the determination of the value of an easement which is adopted with reference to mineral lands where the minerals are in situ is applicable to like easements over oil-bearing lands, though the practical application of the rule may be more difficult as to oil-bearing lands. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

12. **EMINENT DOMAIN—Damages for Taking Oil-bearing Lands.** Where the question in proceedings in the exercise of the right of eminent domain is what damages shall be awarded for a right of way over oil-bearing land, the plaintiff should be permitted to prove progressive decrease in the production of the oil field within which the land in question is situated. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

Dismissal of Proceedings.

13. **EMINENT DOMAIN, Right to Dismiss or Withdraw from Proceedings, When Terminates.**—A proceeding by a railroad company to condemn real property cannot be dismissed after the commissioners' report has been filed with the clerk of the court. (Wis.) *Sprague v. Northern Pac. Ry. Co.*, 997.

See Tenancy in Common, 1.

EQUITY.*Chancery Practices.*

1. **EQUITY JURISDICTION—Multifariousness of Bill.**—It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Each case must be decided upon its own circumstances. The criterion by which courts are governed is convenience in the administration of justice. If the bill reaches the desired end in a convenient way for all concerned, and the mode adopted is not so injurious to anyone as to render it unjust for the suit to be maintained in the form adopted, the bill will not be deemed to be multifarious. (Va.) *Johnson v. Black*, 890.

2. **EQUITY PRACTICE.—To Maintain a Suit by One for the Benefit of himself and others**, there must be a community of interest as well as a right of recovery by reason of the same essential facts. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

3. **EQUITY PRACTICE—Appeal.**—Chancery Cases should be so **Tried**, as a rule, that when appealed they may be finally disposed of. (Mich.) *Culy v. Upham*, 388.

4. **EQUITY JURISDICTION.**—Courts of equity having once acquired jurisdiction never lose it simply because jurisdiction of the same matter is given to courts of law, unless the statute conferring such jurisdiction uses restrictive or prohibitory words. (Va.) *Johnson v. Black*, 890.

Laches.

5. **LACHES** cannot be Imputed to one who is innocently ignorant of his rights. (Va.) *Johnson v. Black*, 890.

6. **RELIEF IN EQUITY—Laches.**—A delay of eight months after the entry of an order settling an administrator's account before bringing a suit in equity for relief from such settlement does not constitute such laches as to require the denial of the relief sought. (Or.) *Froebrich v. Lane*, 634.

7. **LACHES, Plaintiffs, When not Chargeable with, After the Commencement of an Action.**—The finding that the defendants did certain things or perfected certain work prior to the trial of an action and during its pendency, and thereby incurred considerable expense, cannot relieve them from liability. The plaintiff cannot be chargeable with laches because, after the commencement of action, the defendants proceeded to complete the work under a contract which is by the plaintiff's complaint assailed as invalid. (Wis.) *Chippewa Bridge Co. v. Durand*, 931.

Probate Proceedings.

8. **EQUITY, Relief in from Probate Proceedings.**—The fact that a county court has exclusive jurisdiction in matters of probate has no peculiar force to differentiate its decrees and orders from those of any other court possessing exclusive jurisdiction within its compass. (Or.) *Froebrich v. Lane*, 634.

9. **RELIEF IN EQUITY from Proceedings of Probate Courts** will not be Granted for the correction of errors or irregularities, nor where the party had an opportunity to be heard in the original proceeding and to have errors revised on appeal, and neglected to avail himself thereof. (Or.) *Froebrich v. Lane*, 634.

10. **ORDERS IN PROBATE.**—Relief in Equity from an Order is not Prevented by the Failure to Apply for Such Relief by Motion under a statute authorizing the court, in its discretion, and upon

such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. (Or.) *Froebrich v. Lane*, 634.

11. **PROBATE, Order in, When Final so as to Entitle a Party to Relief in Equity.**—Where an order has been procured through the fraud of an administrator settling his accounts contrary to an agreement made by him, such order is final, and relief may be had therefrom in equity, though distribution of the estate has not been made, nor receipts filed, nor the final discharge of the administrator granted. (Or.) *Froebrich v. Lane*, 634.

12. **PROBATE.—Relief in Equity from an Order Settling an Administrator's Accounts** will be granted where it appears that he procured them to be settled contrary to his agreement that he would not claim extra compensation for his services nor beyond a specified sum for attorneys' fees, if the heirs had no knowledge of the filing of the account, nor of the time fixed for settling it, though notice thereof was given in the mode prescribed by statute. They were not guilty of laches in assuming that he would keep his agreement, and were not called upon to keep a check on his actions. (Or.) *Froebrich v. Lane*, 634.

Taxpayer's Remedy for Diversion of Public Funds.

13. **EQUITY—Taxpayer, Denial of Relief to Because of His Personal Interest.**—A court of equity is not justified in denying redress to a taxpayer suing to prevent the paying out of money for the construction of a bridge, the contract for which was made in defiance of a municipal charter, by the fact that he was the owner of a toll bridge, the value of which will probably be diminished by the new bridge to be constructed. Such a plaintiff has the same right to prevent the misuse of public money upon an illegal contract for a second bridge as if his private interests were less. (Wis.) *Chippewa Bridge Co. v. Durand*, 931.

14. **EQUITY JURISDICTION—Remedy of Taxpayers for Diversion of Public Funds.**—Courts of equity have jurisdiction to restrain the illegal diversion of public funds at the suit of one or more citizens and taxpayers, when brought on behalf of himself or themselves and others similarly situated, and to compel the restitution of public funds illegally diverted and lodged in the hands of persons not entitled to them who have taken them with notice of the wrongful diversion, and the governing body of the subordinate or local government will not act or take the necessary steps to have such funds restored. (Va.) *Johnson v. Black*, 890.

Note.

Equity, relief in from orders and decrees in probate, 640-647.
wills, jurisdiction of to grant relief from probate of, 643-645.

ESTATE OF DECEDENT.

See Descent and Distribution; Executors and Administrators.

ESTOVERS.

1. **ESTOVERS—Implied Right to.**—The right to estovers is an incident to be implied from the mere leasing of a farm. (Iowa) *Anderson v. Cowan*, 303.

2. **ESTOVERS.**—The Common Law in respect to estovers is in force in Iowa. (Iowa) *Anderson v. Cowan*, 303.

3. **ESTOVERS** are of Three Kinds: 1. Housebote, being a sufficient amount of timber for repairing buildings and burning in the house; 2. Plowbote, for making and repairing implements of husbandry; and 3. Haybote, for repairing hedges and fences. (Iowa) *Anderson v. Cowan*, 303.

4. **ESTOVERS—Fuel.**—Dead and Fallen Timber may be burned by a tenant for firewood. (Iowa) *Anderson v. Cowan*, 303.

5. **ESTOVERS—Fuel.**—Unless Growing Trees are such as customarily are cut down for firewood, a tenant should not be permitted to make use of them for that purpose. (Iowa) *Anderson v. Cowan*, 303.

Note.

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EVIDENCE.

In General.

1. **EVIDENCE.**—Judicial Notice will be Taken of the fact that an electric lighting company cannot erect and maintain its lights in the streets of a city without authority from the municipality. (R. I.) *Nelson v. Narragansett Elec. etc. Co.*, 711.

2. **EVIDENCE—Market Value.**—Where a witness shows that he is qualified to testify respecting the market value of lands, and purports to do so, his testimony should not be stricken out on the ground that it is merely speculative and conjectural, because he also states that he would take into consideration what he would pay for it and have sufficient margin for speculation during at least five years. (Cal.) *Southern Pac. R. R. Co. v. San Francisco Sav. Union*, 36.

Parol to Vary Writing.

3. **CONTRACT, Parol Evidence to Vary.**—Where a seller agrees in writing to deliver the subject of a sale "f. o. b." cars, parol evidence is not admissible to prove that prior to the making of such contract he agreed to furnish cars. (Wis.) *Vogt v. Schienebeck*, 989.

4. **CONTRACT, Prior Negotiations, When Merge in.**—When a contract is reduced to writing, all prior negotiations are merged

therein, in the absence of relievable fraud or mistake, unless the writing appears clearly to be merely a part execution of a verbal contract. (Wis.) Vogt v. Schienebeck, 989.

5. **CONTRACT, Evidence to Explain Meaning of.**—The Term “F. O. B. Cars” has a meaning so plain that it is not permissible to explain it by custom or otherwise. (Wis.) Vogt v. Schienebeck, 989.

Expert Testimony.

6. **EVIDENCE—Experts—Qualifications.**—The question of the qualification of a witness to act as an expert is largely in the discretion of the trial court, and its ruling cannot be disturbed unless an abuse of discretion is clearly shown. (Va.) Lane Brothers & Co. v. Bauserman, 872.

See Criminal Law; Custom; Witnesses.

EXECUTION.

1. **EXECUTION.**—The Levy of an Execution on Lands Creates a Lien where none previously existed by virtue of the judgment. (Cal.) Lean v. Givens, 79.

2. **EXECUTION, Amendment to Statute Relating to, Nonretroactive Effect of.**—An amendment of a statute, extending the time within which redemption may be made from execution sales is not applicable to sales under judgments rendered before its passage. (Cal.) Welch v. Cross, 63.

3. **EXECUTION SALES, Constitutionality of Statute Extending Time to Redeem from.**—A statute extending the period within which to redeem from execution sales from six months to one year cannot be applied to subsequent sales under judgments rendered prior to its enactment without impairing their obligation in the manner prohibited by section 10 of article 1 of the constitution of the United States, and section 16 of article 1 of the constitution of California. (Cal.) Welch v. Cross, 63.

See Exemptions.

EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS—Voidable Sale by—Attack by Creditor.—A judgment creditor of an heir cannot levy upon and sell land formerly belonging to the estate, but held under a voidable title by the administrator because purchased by him at his own sale. (Ga.) Williams v. Williams Co., 100.

See Descent and Distribution; Equity, 8-12; Garnishment.

Note.

Executors and Administrators, accounts of, relief in equity from orders settling, 641.

EXEMPTIONS.

1. **EXEMPTIONS—Whether Contractor can Claim.**—A householder who takes work under a contract and employs others to assist him, may claim an exemption from garnishment to the extent that the amount due represents his manual labor, not exceeding thirty dollars. (Mich.) Rikerd Lumber Co. v. Chrouch, 416.

2. **EXEMPTION OF WAGES—Estoppel to Assert.**—A debtor who induces his creditors to sue on their claim and garnish his per-

personal earnings is estopped from thereafter setting up the exemption of such earnings. (Iowa) Dowling v. Wood, 301.

3. **EXEMPT PROPERTY**—Sale of—Joinder of Wife.—Section 2906 of the Iowa code, which requires a mortgage of exempt personal property to be concurred in by the wife, does not prohibit the sale or assignment of exempt property. (Iowa) Dowling v. Wood, 301.

See Homestead.

EXPERT WITNESS.

See Evidence, 6.

FAIRS.

See Nuisance, 2.

FIRES.

See Railroads, 2-4.

FRAUD.

FRAUD—Reliance upon Representations.—To enable a person to set aside a contract for fraud, the representations alleged to be false, must be relied upon in entering into the contract. (Ill.) Hooker v. Midland Steel Co., 170.

FRAUDS, STATUTE OF.

See Deeds, 6.

GAMING.

GAMING—Bets and Wagers defined and distinguished. (Ohio St.) Stevens v. Cincinnati Times-Star Co., 586.

See Lottery.

GARNISHMENT.

GARNISHMENT—An Executor or Administrator cannot, in advance of an order of distribution, be charged as garnishee in respect to property or funds in his hands belonging to an heir or legatee; and this rule is not changed by section 5531 of the Revised Statutes of Ohio. (Ohio St.) Orlopp v. Schueller, 583.

GIFTS.

1. **GIFT CAUSA MORTIS** to be valid must be made in expectation of the donor's death. He must die of the disorder or peril existing or impending at the time the gift is made, and there must be a delivery of the thing given. (Minn.) Winslow v. McHenry, 448.

2. **GIFTS**—Deposit in Bank.—If a person has made a deposit of money in bank for which he has received a certificate of deposit payable to the order of himself or wife on return of the certificate, so that his wife may collect the money after his death, and he retains the certificate in his possession until his death, there is no gift of the money, either causa mortis or inter vivos, and if, after

his death, she indorses the certificate and collects the money, she is liable to her husband's administrator therefor. (Minn.) Winslow v. McHenry, 448.

GUARDIAN AND WARD.

PROBATE COURT—Jurisdiction to Appoint Guardian—Presumption.—If a petition for the appointment of a guardian states an unstutory ground, a decree appointing him expressly on that ground is void and not aided by a presumption that the court acted within its jurisdiction. (R. I.) Providence County Sav. Bank v. Hughes, 682.

Note.

Guardian and Ward, accounts, relief in equity from orders settling, 641.

HIGHWAYS.

HIGHWAYS by Adverse User.—A public highway obtained solely by adverse user for the period of time prescribed by the statute is not necessarily limited in width to the track made by passing vehicles. Its width is to be determined as a question of fact by the character and extent of the user. (Minn.) Arndt v. Thomas, 418.

See Municipal Corporations.

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- public streets, gas-pipes in, whether constitute additional servitude, 235.
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- public streets, use of as, 235.
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- sewers, drains, and culverts in, whether constitute additional servitudes, 266.
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Highways, telegraph and telephone lines and poles, whether impose additional servitudes upon, 260-264.
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HOMESTEADS.

In General.

1. **HOMESTEAD in Contiguous Tracts.**—Though land is bought from the government at different times and by different titles, it may constitute but one tract, all resided upon and in possession of the claimant, and be exempt from execution as his homestead. (Cal.) *Payne v. Cummings*, 47.

2. **HOMESTEAD, Inclosure of.**—It is not necessary that lands claimed as a homestead and described in the homestead declaration be inclosed with a fence. (Cal.) *Payne v. Cummings*, 47.

3. **HOMESTEAD, Use of the Premises.**—Where a tract of land consisting of a pre-emption and a desert claim is included in a homestead declaration, it is not necessary to show that the whole was devoted to any particular or profitable use by the claimant, or that he devoted it to any use whatever, other than as a part of his home place or home. (Cal.) *Payne v. Cummings*, 47.

4. **HOMESTEAD, Use of, What Unnecessary.**—The question of use as applied to a homestead relates only to the use of the property as a home. If used as a home or a part thereof, it is immaterial whether it is farmed, grazed or devoted to any agricultural use whatever. The land may be used solely for living on without being devoted to any use at all, and still be a homestead. (Cal.) *Payne v. Cummings*, 47.

5. **HOMESTEAD, Amount of Area of.**—If the property is situated in a rural district where farming and grazing are the only useful purposes it can be devoted to in addition to making a home of it, the amount, or area, which can be held as a homestead is limited only by its value. (Cal.) *Payne v. Cummings*, 47.

6. **HOMESTEAD—Desert Land Claim.**—The fact that land is desert and presumably unfit for agricultural purposes does not show that it may not, with other lands, be held as, and devoted to the use of, a homestead until it can be reclaimed and made fit for grazing or some other agricultural purpose. (Cal.) *Payne v. Cummings*, 47.

7. **HOMESTEAD, Water Rights Included Within.**—An interest in water rights, ditches, etc., though it is but a partial interest in an entire water system held jointly and in common with others, is, if obtained specially for use upon the lands claimed as a homestead, and necessary and appurtenant thereto, a part of the homestead and as such exempt from execution. (Cal.) *Payne v. Cummings*, 47.

8. **HOMESTEAD, Exemption in Favor of Grantee of.**—The grantee of a person entitled to hold property exempt as a homestead takes title free from all lien and liability for the grantor's debts from which it was exempt at the date of his conveyance. (Cal.) *Payne v. Cummings*, 47.

9. **HOMESTEAD in an Undivided Interest.**—The rule that a homestead cannot affect an undivided interest in land is inapplicable where the interest as originally existing included the whole property, and the claimant subsequently conveyed a moiety thereof. (Cal.) *Payne v. Cummings*, 47.

Execution Against Property.

10. **HOMESTEAD—Execution Sale, Power of the Court to Proceed Without Notice on the Report of the Appraisers.**—If, after the levy of an execution on property claimed as a homestead, and the appointment of appraisers, they report that the value of the property exceeds the amount of the homestead exemption, and that the land cannot be divided, the court may, without notice to the defendant, order a sale of the whole premises, where the homestead exemption is purely a statutory right, and the statute does not require such notice. (Cal.) *Lean v. Givens*, 79.

11. **HOMESTEAD, Execution Against, Delay in Proceedings, When not Fatal.**—The fact that, after the levy of an execution on premises claimed as a homestead, no further proceedings were taken for sixteen months, does not show that the levy was abandoned, nor prevent the plaintiff from subsequently prosecuting the proceedings necessary to authorize the sale of the property under his writ. If the defendant believed the delay unreasonable, his remedy was by motion in the court whence the writ issued to have the levy vacated. (Cal.) *Lean v. Givens*, 79.

12. **HOMESTEAD, Lien of Execution Levy upon.**—The levy of an execution on property described in a declaration of homestead which exceeds in value the amount of the homestead exemption creates a lien thereon so far as there is an excess over the exemption. (Cal.) *Lean v. Givens*, 79.

Abandonment.

13. **HOMESTEAD, Abandonment or Annulment of.**—A Conveyance of a Moiety or Part of a Homestead by a husband after the death of his wife, does not abandon or nullify the homestead exemption as against an execution based upon debts contracted by him in her lifetime. (Cal.) *Payne v. Cummings*, 47.

HOMICIDE.

1. **HOMICIDE—Principal and Accessary.**—One who is present as an aider and abettor in a homicide is a principal, although another does the killing. (R. I.) *State v. Nargashian*, 715.

2. **HOMICIDE Committed Under Coercion.**—An Instruction in a murder trial, that if the jury believe that the defendant assisted in the homicide, but did so under fear of instant death at the hands of a third person, they are to find him not guilty, is properly refused, as taking no account of any opportunity for the defendant to escape or successfully defend himself, or of the reasonableness of his fear. (R. I.) *State v. Nargashian*, 715.

3. **HOMICIDE—Coercion.**—Fear Induced by one person is no defense for killing another under its influence. (R. I.) *State v. Nargashian*, 715.

4. **HOMICIDE—Coercion.**—If One has Sufficient Power of mental action to put his own chances of safety against the life of an innocent third person, his act can neither be entitled to excuse nor reduction on the ground of fear. (R. I.) *State v. Nargashian*, 715.

Note.

Homicide, coercion as a defense in prosecutions for, 722, 723.
to save one's own life, 722, 723.

HUSBAND AND WIFE.

1. MARRIED WOMEN—Contract to Purchase Land—Disaffirmance.—A married woman electing to rely upon her disability to avoid a contract to purchase land which has been conveyed to her cannot recover partial payments made by her. (Tenn.) *Edwards v. Stacey*, 831.

2. MARRIED WOMEN—Contract to Purchase Land—Disaffirmance.—The rule that a married woman, electing to rely upon her disability to avoid a contract to purchase land, cannot recover partial payments made by her, applies as well to executory contracts under a valid executed contract by the vendor to make a conveyance, as when a conveyance of the title has been made. (Tenn.) *Edwards v. Stacey*, 831.

3. DEED to Married Woman and Body Heirs.—A conveyance of land to a married woman and "her body heirs" vests a fee simple in her, but no estate in her children. (Tenn.) *Bingham v. Weller*, 803.

4. HUSBAND AND WIFE—Conveyances Between.—A conveyance of land by a husband to his wife creates a separate estate in her, and divests him of all interest, present or contingent, in the land, and he is not entitled to an estate by the curtesy therein upon the death of his wife. (Tenn.) *Bingham v. Weller*, 803.

5. HUSBAND AND WIFE.—A Wife has, in Iowa, the Right to Contract with Her Husband in respect to her separate estate, and hence to receive his promissory note for moneys loaned by her to him. (Iowa) *Estate of Deaner*, 374.

6. HUSBAND AND WIFE—Trust Fund.—Where the Husband Borrows Money of His Wife and executes his promissory note in her favor therefor, such moneys cannot be regarded as retained by him as a trust fund. The relation between them is that of debtor and creditor only. (Iowa) *Estate of Deaner*, 374.

7. HUSBAND AND WIFE—Limitations of Action Between.—The general statute of limitations applies to contracts between husband and wife. Hence, she cannot maintain an action upon a promissory note executed by him to her, after the expiration of the time allowed by law for the commencement of actions on such instrument. (Iowa) *Estate of Deaner*, 374.

8. MARRIED WOMEN.—The Doctrine of Equitable Estoppel does not generally apply to married women, especially in the absence of fraud. (Va.) *Lewis v. Apperson*, 903.

9. ALIENATION OF AFFECTIONS—Mitigation of Damages.—In an action for alienating the affections of a husband the defendant may show, in mitigation of damages, that other women than herself maintained improper relations with the husband, although this fact was unknown to the plaintiff. (R. I.) *Angell v. Reynolds*, 707.

See Curtesy; Dower; Witnesses, 2.

Note.

Husband and Wife, coercion of husband, modern statutes respecting, 725.

coercion of wife by husband, presumption of in criminal prosecutions, 726.

See Witnesses.

Incest, husband and wife are not competent to testify against each other in prosecutions for, 767.

INFANTS.

1. **INFANTS — Disaffirmance by Guardian's Conveyance.**—A guardian's conveyance of the land of his ward during her minority does not amount to a disaffirmance of a prior mortgage executed by her. (Mich.) *Shreeves v. Caldwell*, 396.

2. **INFANTS — Disaffirmance — Administrator's Conveyance.**—Where an infant and her husband have mortgaged their homestead, a subsequent conveyance by his administrator passes no right to disaffirm the mortgage, as such right rests in the infant. (Mich.) *Shreeves v. Caldwell*, 396.

3. **INFANTS—Disaffirmance by Making Deed.**—A deed executed by one after reaching his majority does not amount to a disaffirmance of a deed made by him during his infancy, unless the second deed is inconsistent with the first. (Mich.) *Shreeves v. Caldwell*, 396.

4. **INFANTS—Disaffirmance by Quitclaim Deed.**—The execution of a quitclaim deed does not amount to a disaffirmance of a mortgage given by the grantor during her infancy. (Mich.) *Shreeves v. Caldwell*, 396.

INJUNCTIONS.

1. **INJUNCTION—Allegation of Intent, When Unavailing.**—It will not be presumed that a railroad company will violate its contract with a municipality, and an allegation in the complaint in a suit for an injunction that it intends to do so, in advance of any act of the company constituting such a violation, cannot prevail against the presumption of good faith and fair dealing. (Ind.) *Mordhurst v. Fort Wayne etc. Traction Co.*, 222.

2. **AN INJUNCTION not Only Restrains the Parties to the Action,** but also, when so drawn, those who act under or in connection with the party as attorneys, agents, or employes. (N. Y.) *People v. Marr*, 562.

3. **INJUNCTION, Violation of by Persons not Parties to the Action.**—No person with knowledge of the terms of an injunction, even if not a party to the action, can act or co-operate with a party in doing a prohibited act without incurring the penalty prescribed by the statute. (N. Y.) *People v. Marr*, 562.

4. **INJUNCTION Against Labor Unions, Effect of on Members not Parties to the Action.**—If an injunction issued, restraining a labor union and each of its members, agents, servants, and representatives from threatening or intimidating workmen in the plaintiff's employ or who come to him for employment, and from interfering with his business by any unlawful means, members of such union who afterward violate such injunction are, if they had knowledge of its issuing and terms, though they were not parties to the action, guilty of contempt of court. (N. Y.) *People v. Marr*, 562.

5. **INJUNCTION, Criminal Contempt in Violating.**—The Fact that an Injunction was not Personally Served upon Agents of the Defendant who were guilty of violating it, does not deprive the court of the power to punish them for a criminal contempt. (N. Y.) *People v. Marr*, 562.

See Equity, 13, 14; Trade Names.

INSURANCE.***Fire Insurance in General.***

1. **INSURANCE—Goods Held on Installment Plan.**—A policy of insurance on household furniture, which provides that it shall be void

if the interest of the insured is other than the unconditional and sole ownership, is void as a whole, if a portion of the furniture is held by the insured on the installment plan. (B. I.) *Dow v. National Assur. Co.*, 728.

2. INSURANCE, Breach of Conditions Precedent Known to the Insurer.—If an insurance company, or its general agent, is at the time of issuing a policy notified of facts which, under the terms of the policy, would render it void if not noted thereon, the company cannot avail itself of such defense. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

Mortgagor and Mortgagee.

3. INSURANCE.—A Mortgagor and Mortgagee may Maintain a Joint Action on a policy of insurance against fire where the loss is made payable to the latter as his interest may appear. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

4. INSURANCE—Mortgagee, When a Proper Party Defendant. Under a policy of insurance against fire issued to a mortgagor and payable to the mortgagee as his interest may appear, there is but a single contract, and if the mortgagee refuses to join in an action on the policy, he is a proper party defendant under a statute providing that where the parties have a united interest, they must be joined as plaintiff, and if any refuses to join, he must be made a party defendant. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

5. JURISDICTION—Action Brought by Mortgagor on an Insurance Policy Where There is a Nonresident Mortgagee.—If a policy of insurance issues in favor of a mortgagor, but payable to a mortgagee as his interest may appear, and the latter and the insurer are nonresidents of the state, and the contract is made in another state, the courts of this state, nevertheless, have jurisdiction to entertain an action on the policy brought by the mortgagor to which the mortgagee is made a party defendant. As the mortgagor's interest pervades the whole recovery, his right to maintain the action cannot be impaired by the nonresidence of the mortgagee. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

Insurance Agents.

6. INSURANCE, Incorrect Reporting of Risk by Agent.—If an agent fails to correctly report a risk, the company, and not the insurer, is chargeable with the omission. (Iowa) *McLaughlin v. American Fire Ins. Co.*, 344.

7. INSURANCE, Agent's Authority to Correct Policy After a Loss Occurs.—Where, by the mistake of an agent in issuing a policy, words are omitted necessary to make it embody the contract of insurance, such words may be subsequently inserted by him even after a loss occurs. Hence, if by mistake, he fails to attach a slip covering loss by lightning, he may attach it after such loss, if the policy remains in his possession. (Iowa) *McLaughlin v. American Fire Ins. Co.*, 344.

8. INSURANCE, Agent, Continuance of Authority Until Delivery of the Policy.—Until the written policy is made to conform to the contract for insurance, it is not a completely executed contract, and the agent retains authority, the policy still being in his possession, to correct it so as to conform to such contract. (Iowa) *McLaughlin v. American Fire Ins. Co.*, 344.

9. INSURANCE—Agents of the Insurer, Who Deemed to be.—If a policy of insurance, when delivered, has written on it by offi-

cers or agents the words "Patterson & Son, Agents," this is sufficient to justify the jury in finding that such persons were such agents, though officers and clerks of the insurer testify, without contradiction, that it was the habit of the company whenever an application was presented for insurance through brokers, to write their names as agents on the policy, and that it was not intended thereby to state that such persons were in fact agents of the company. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

10. INSURANCE—Conditions Precedent, Failure of Agents to Notify Insurer of Breach of.—If a firm is the general agent of an insurer authorized to deliver policies, or is held out by the insurer to be such agent and possessing such powers, the firm can, as to persons dealing with it under its real or apparent authority, waive a condition precedent, even if notice of the fact is not given to the insurer. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

11. INSURANCE—Notice Given to One Agent, When Affects Others and the Assured.—Information imparted to one agent of the insurer in dealing with the assured may be imputed to the company and to another agent participating in those dealings, though in fact the second agent is ignorant of the information imparted to the first. Hence, if one of a firm of insurance agents is notified before a policy issues of a fact which by its terms makes it void, such fact must be deemed waived if the policy subsequently issues through its delivery by the other agent to whom such information had not been given. (N. Y.) *Lewis v. Guardian Fire etc. Co.*, 557.

See Benefit Society.

INTEREST.

1. INTEREST, When not Allowable.—Interest cannot be allowed on damages when the amount due is not ascertainable by mere computation. Hence, if the plaintiff's demand is subject to reduction because of the defective and dilatory performance of his work, and the amount of the reduction can be established only by taking evidence, his claim is not liquidated, and interest cannot be awarded to him on the amount found to be due him after making such reduction. (N. Y.) *Excelsior Terra Cotta Co. v. Harde*, 493.

2. INTEREST—Rate After Maturity.—The statutory rule in Iowa that the rate of interest fixed in a contract prevails after maturity as well as before, has no application to a stipulation for semi-annual payments. (Iowa) *Rew v. Independent School District*, 282.

See Banks and Banking, 3.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—Importation—State Regulation.—The importation or sale of intoxicating liquor, whether in the original or broken packages, is subject to the legislation of the state into which they are imported, stored, or sold. (Tenn.) *Harrell v. Speed*, 814.

See Commerce.

JUDGMENTS.*In General.*

1. **JUDGMENT, Power of Court Over, When Terminates.**—After proceedings to vacate a judgment on motion for a new trial, or on appeal, or under section 473 of the Code of Civil Procedure have ended, and the time therefor has expired, the superior court has no power to vacate or modify its judgment in a matter of substance on account of judicial error in the decision, no matter how apparent such error may be on the face of the record. (Cal.) *Grannis v. Superior Court*, 23.

2. **JUDGMENT, Motion to Vacate or Modify, When a Matter of Substance, and not for the Correction of a Clerical Error.**—A motion to modify a judgment by striking therefrom that part purporting to grant an absolute and immediate divorce, on the ground that the court had not jurisdiction at the time of granting such divorce, goes to the substance and effect of the judgment, and is not for the correction of a clerical error, and hence cannot be granted after the time to appeal from, or to modify or vacate, the judgment as fixed by the statute has expired, unless the judgment in respect to the provision referred to is void. (Cal.) *Grannis v. Superior Court*, 23.

3. **JUDGMENT, When Void on Collateral Attack.**—The cases holding judgments valid on collateral attack, though founded upon an erroneous view of the law, are none of them cases in which the law which the court mistook was the law which vested it with jurisdiction over the subject matter. (Cal.) *Grannis v. Superior Court*, 23.

Res Judicata.

4. **RES JUDICATA.**—A Judgment of One Court is conclusive in another in an action between the same parties not only as to the same cause of action, but as to other causes involving the right or title asserted and the defenses interposed in the previous action; and not only as to those matters expressly determined, but also as to those matters collaterally involved and necessarily determined in reaching the final judgment. (Iowa) *Rew v. Independent School District*, 282.

5. **RES JUDICATA—Bonds and Coupons—Conclusion of Law.**—If an action has been brought in a federal court on coupons attached to bonds issued by a school district, and it has been adjudged, as a legal conclusion, that recitals in the bonds estop the district from showing that there were no valid judgments which the proceeds of the bonds were or could have been used to extinguish, a state court, in an action on the bonds between the same parties on the same state of facts, is precluded from reaching a different conclusion. (Iowa) *Rew v. Independent School District*, 282.

See Justice of Peace.

JURISDICTION.

See Courts.

JUSTICE OF PEACE.*Signatures.*

1. **A STENCIL SIGNATURE** of a Justice of the Peace to an original notice, which is not a writ or process issuing out of court, is sufficient to confer jurisdiction, under a statute providing that such a notice "must be subscribed by the plaintiff, his attorney, or the justice

of the peace before whom it is returnable." (Iowa) *Loughren v. Bonniwell*, 319.

2. **SIGNATURE by Justice to Blank Notice.**—An original notice, which is not a writ or process issuing out of court, signed by a justice of the peace in blank and delivered to the plaintiff or his attorney with authority to fill it out, will, when filled out and served, confer jurisdiction, under a statute providing that such a notice "must be subscribed by the plaintiff, his attorney, or the justice of the peace before whom it is returnable." (Iowa) *Loughren v. Bonniwell*, 319.

Judgments.

3. **JUSTICE'S JUDGMENT—Residence of Parties—Collateral Attack.**—A justice's judgment, regular on its face, cannot be collaterally attacked by showing that the parties did not live in a township adjoining the residence of the justice. (Mich.) *Cole v. Potter*, 398.

4. **JUSTICE'S JUDGMENT—Entry of Time of Appearance.**—A docket entry of a justice reading: "December 12, 1901, 10 o'clock A. M. Cause called. The plaintiff appears in person, with E., his attorney. Defendant does not appear. After waiting one hour, and defendant not appearing," etc., shows that the plaintiff appeared within the hour. (Mich.) *Cole v. Potter*, 398.

5. **JUSTICE'S JUDGMENT—False Transcript—Collateral Attack.**—When a justice's judgment has been docketed on a transcript in the circuit court, it cannot be shown in a collateral proceeding that the transcript filed is not a true transcript (Mich.) *Cole v. Potter*, 398.

6. **JUSTICE'S JUDGMENT—Limitation of Actions.**—A justice's judgment, when docketed on a transcript in the circuit court, is a judgment of a court of record, and the ten year statute of limitations applies to an action on it. (Mich.) *Cole v. Potter*, 398.

LACHES.

See Equity, 5-7.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Assignability of Lease on the Shares.**—A lease of land on the shares, including the use of buildings, farm implements, stock, and other personal property, is a personal contract not assignable without the consent of the lessor, because the amount to be received by him and the care of the property depend on the character, industry, and skill of the lessee. (Or.) *Meyer v. Livesley*, 667.

2. **LANDLORD'S LIABILITY to Tenant's Family for Failure to Repair.**—A landlord who has agreed with his tenant to make repairs is not liable in tort to a member of the tenant's family who receives personal injuries from the landlord's neglect to repair. (R. I.) *Davis v. Smith*, 691.

3. **LANDLORD'S LIABILITY to Tenant's Family for Contagious Disease.**—A landlord who leased premises, knowing them to be infected with diphtheria, and concealing that fact from the tenant, is liable for the death of one of the tenant's family from the disease; but if he did not have actual knowledge of the condition of the property, and the tenant must have known of the existence of noxious odors and the like as soon as the tenancy began,

then the tenant has no right to continue the exposure of his family to the danger, and so aggravate the damage. (R. L.) *Davis v. Smith*, 691.

See Estovers.

Note.

Landlord and Tenant. See Estovers.

LEASES.

See Landlord and Tenant.

LIBEL AND SLANDER.

1. **LIBEL.**—Though Words are Harmless in Themselves, if in the light of extrinsic facts a meaning is conveyed to the reader which will be calculated to expose the person about whom the words are used to contempt or ridicule, they then become libelous, and an action may be maintained therefor, although no special damages are alleged. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

2. **LIBEL.**—Published Words Which Impute to One Language known to his friends and acquaintances to contain false statements are libelous. (Ga.) *Pavesich v. New England Life Ins. Co.*, 104.

LICENSES.

A **LICENSE** to do an Act Implies Authority to do what is necessary for that purpose. (S. C.) *Granger v. Postal Tel. Co.*, 750.

See Commerce.

LIENS.

LIEN FOR MONEY Contributed with Which to Purchase Real Property.—If a daughter gives money to her father under an oral agreement between them that it shall be employed to acquire property to be used by him and her mother as a home during their lives, and, after their death, shall go to the daughter, and he subsequently acquired such property with this and other money under circumstances when no resulting trust arises in favor of the daughter, she has an equitable lien on such property for the amount so furnished, with interest from the time the money was received by the father, which lien may be enforced after the death of her parents as against their grantees who are not purchasers for a valuable consideration. (N. Y.) *Leary v. Corvin*, 542.

LIFE ESTATES.

See Estovers.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS**—Payment After Death of Obligor.—Where the maker of a note assigns to the payee a mortgage as collateral, and instructs him to foreclose it and apply the proceeds on the note, an application of such proceeds to the payment of the note after the death of the maker does not stop the running of the statute of limitations on the note. (S. C.) *Divine v. Miller*, 743.

2. LIMITATION OF ACTIONS—New Promise by Administrator.—The promise of an administrator to pay the note of his decedent before the bar of the statute of limitations is complete, may renew the debt against the personal estate, but it does not bind the heirs, other than himself, so as to affect their interest in the real estate. (S. C.) *Divine v. Miller*, 743.

See Adverse Possession; Corporations, 4; Husband and Wife, 7; Justice of Peace; Municipal Corporations, 29-54; Process, 3.

LIS PENDENS.

1. LIS PENDENS.—In Order that Lis Pendens may be Effective, it is essential that the litigation to which it refers result in a judgment or decree affecting the property described therein and within the issues made. (Mo.) *Bristow v. Thackston*, 472.

2. LIS PENDENS—Termination.—The dismissal of an action without a trial on the merits terminates the lis pendens, and persons who acquire interests in the property prior to the institution of a second suit for the same purpose are not bound by the judgment or decree therein unless made parties. (Mo.) *Bristow v. Thackston*, 472.

3. LIS PENDENS—Dismissal of Suit.—The title of a pendente lite purchaser is not affected, unless the suit is brought to a successful termination against his vendor and if the action is dismissed or abandoned by the adverse party, the rights of such purchaser remain the same as if the suit had never been brought or the lis pendens notice had never been filed. (Mo.) *Bristow v. Thackston*, 472.

4. LIS PENDENS—Dismissal of Action.—A voluntary abandonment or discontinuance of an action destroys the lis pendens filed therein and no subsequent suit founded upon the same cause of action, much less one seeking a different remedy for different reasons against the same land, can interfere with the title of a lis pendens purchaser or bind it by the judgment rendered in that case, unless he is made a party thereto. (Mo.) *Bristow v. Thackston*, 472.

LOTTERY.

1. LOTTERY—Chance—Calculation and Certainty.—The element of chance in a lottery is not incompatible with the presence of an element of calculation or even certainty; if the dominating, determining element is one of chance, that element gives character to the whole scheme. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

2. LOTTERY—Guessing on the Result of an Election.—A scheme whereby people are invited to pay a certain sum for a subscription to a newspaper and the privilege of guessing the number of votes that will be cast for a specified public officer at the coming election, the guessers coming nearest to the actual vote to receive money prizes, is within the condemnation of the Ohio statutes against lotteries and schemes of chance. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

3. LOTTERY—Relief in Equity—Suit by One for Benefit of All.—Where some four hundred thousand people have each paid fifty cents to a newspaper company at its invitation to participate in a guessing contest which amounts to a lottery, one of their number cannot invoke the jurisdiction of equity and ask for an injunction and a receiver on the ground that he has a right to

represent and appear for the others, that they are numerous, that the fund equitably belongs to them all, and that therefore he has a right to sue in equity for the benefit of all. (Ohio St.) *Stevens v. Cincinnati Times-Star Co.*, 586.

MANDAMUS.

1. **MANDAMUS** is not a Writ of Right, and the granting of the writ is discretionary with the court in view of all of the existing facts and with due regard to the consequences which will result. (Ill.) *People v. Rock Island*, 179.

2. **MANDAMUS** by Private Citizen to Enforce Public Right.—A person may, in his private capacity, institute a proceeding by mandamus to protect a public right, unless it has been lost, or an estoppel exists against the public to assert it. (Ill.) *People v. Rock Island*, 179.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. **CONTRACT** of Employment at Certain Daily Wages, payable monthly and for no particular time, though not signed by the employé at the time the contract is dated, is effective as to any occurrence happening after it is actually signed, and during the continuance of the employment. (Ill.) *Chicago etc. Ry. Co. v. Hamler*, 187.

2. **CONTRACTS** of Employment.—The Malicious Procurement of the Breach of a subsisting contract of employment, resulting in damage, is an actionable wrong. (Ga.) *Employing Printers' Club v. Doctor Blosser Co.*, 137.

3. **MASTER AND SERVANT** — Vice-principals — Negligence.—Evidence of the refusal of employés to work on premises considered by them dangerous, of which fact they informed their vice-principal, and of the absence of any placard or other signal to show that the premises were dangerous, is admissible as tending to show the vice-principal's knowledge of the dangerous condition of the premises, and to rebut the idea of contributory negligence on the part of a servant injured while working under orders on such premises. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

4. **MASTER AND SERVANT** — Negligence — Evidence.—If a servant seeks to recover for injury alleged to have been received by being placed in an unsafe place to work, the master has a right to show that such place was safe originally, but afterward was rendered unsafe by the servant's own acts. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

5. **MASTER AND SERVANT** — Vice-principals—Safe Place.—Ordinarily the foreman or boss of a gang of men, engaged in executing the master's orders, is a mere fellow-servant with the other members of the gang, but if such foreman is discharging a non-assignable duty of the master, he is to that extent a vice-principal, and one of such duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

6. **MASTER AND SERVANT**—Vice-principals—Safe Place.—If the place where the servant has been engaged in work was originally

safe, but has become unsafe during his absence and he is ignorant thereof, and cannot discover the fact by ordinary care, it is the duty of the master to inform him, and in his absence this duty devolves upon the foreman of a gang, acting for him as a vice-principal, and the statements of such foreman, made in the presence of the servant, as to the condition of the premises, are admissible as evidence in an action by the servant for injury received from such unsafe condition of the premises. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

MECHANIC'S LIEN.

1. MECHANICS' LIENS—Railroads—Explosives Used on Road-bed.—Explosives furnished for, and used in, blasting rock in tunnels and in grading a railroad are "materials," for which the materialman is entitled to a lien. (Tenn.) *Hercules Powder Co. v. Knoxville etc. R. R. Co.*, 836.

2. MECHANICS' LIENS—Railroads—Notice.—If a contract is entire to furnish material for the construction of a railroad, and shipments of material are made thereunder as ordered, a lien for the entire amount will be created and perfected by giving the required notice within the time specified by statute after the date of the last shipment, although some of the shipments were made more than ninety days before such notice. (Tenn.) *Hercules Powder Co. v. Knoxville etc. R. R. Co.*, 836.

3. MECHANICS' LIENS—Railroads—Notice.—The fact that the last shipment of material to a railroad subcontractor is not delivered, but is stopped in transitu because of the contractor's insolvency, does not affect the seller's right of lien for material previously furnished such contractor more than the statutory period of notice prior to the notice of a claim of lien, when such notice is given within ten days after the insolvency of the subcontractor. (Tenn.) *Hercules Powder Co. v. Knoxville etc. R. R. Co.*, 836.

4. MECHANICS' LIENS—Railroads.—If material is delivered in good faith to a subcontractor to be used in the construction of a railroad, the materialman is entitled to a lien therefor in the absence or definite proof that the material was not so used. (Tenn.) *Hercules Powder Co. v. Knoxville etc. R. R. Co.*, 836.

5. MECHANIC'S LIEN Where Property is Destroyed by Fire. Under the statutes of California, if, before a building is completed and delivered to the owner and before any claim for a lien is filed, such building is destroyed by fire without his fault, nothing remains upon which a mechanic's or materialman's lien can attach, and a suit cannot be maintained to enforce the lien against the land upon which the building stood or which was necessary for the convenient use and occupation thereof. (Cal.) *Humboldt Lumber Mill Co. v. Crisp*, 75.

6. MECHANICS' LIENS—Mortgages—Priority.—A real estate mortgage on property, executed subsequently to the beginning of the continuous construction of a building thereon, is subordinate to the mechanics' liens of all who have contributed to the construction of the building. (Minn.) *Ortonville v. Geer*, 445.

7. MECHANICS' LIENS—Mortgages—Priority.—A real estate mortgage on property on which a building is constructed, to be superior to mechanics' liens, must be executed and recorded prior to the first item furnished by any mechanic's lien claimant, so far as his own claim is concerned. (Minn.) *City of Ortonville v. Geer*, 445.

MINES AND MINERALS.

1. MINES AND MINERALS, Reservation of, When does not Include Limestone.—A conveyance "excepting and reserving therefrom all mines and minerals which may be found on the above piece of land, with the right of entry at any time with workmen and others to dig and carry away the same" does not except from its operation ledges of limestone rising above the natural surface of the earth, and visible when the deed was made, nor give the grantee the right to conduct open quarrying for the purpose of taking possession of such limestone. (N. Y.) *Brady v. Smith*, 531.

2. MINES AND MINING.—Townsite Patents issued by the officers of the land department of the United States cannot be collaterally attacked by persons locating mining claims subsequent to the entry of the townsites and the issuance of the patents therefor, on the ground that the land covered by such patents was known to be mineral at the time of its entry, and hence did not pass under the patents. (S. Dak.) *Board of Education of Deadwood v. Mansfield*, 771.

See Public Lands.

MONOPOLIES AND COMBINATIONS.

1. MONOPOLY—Building and Loan Associations.—The fact that a statute imposes such conditions on the right to conduct the building and loan business as to make it impossible for some persons or associations to engage in it, does not render the statute unconstitutional as creating a monopoly in those who are able to comply with the conditions. (Iowa) *Brady v. Mattern*, 291.

2. CORPORATIONS—Collateral Attack on—Illegal Combinations. The very validity of the corporate organization may be collaterally assailed when an unlawful conspiracy to stifle trade and create a monopoly exists in the articles of association of the corporation. (Mo.) *Finck v. Schneider Granite Co.*, 452.

3. CONTRACTS—Prevention of Competition in Trade.—The true test of the validity of a contract or combination between corporations or other persons to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties thereto, or whether it is so broad as to interfere with the interests of the public. If the former, it is valid, but if the latter, it is void. (Mo.) *Finck v. Schneider Granite Co.*, 452.

4. CONTRACTS in Restraint of Trade—Illegal Combinations.—A combination of corporations engaged in one and the same line of business organized by a series of contracts between each corporation individually and a constituent corporation having a merely nominal capital, and composed of one member from each of the combining corporations, by which contracts it is agreed that the individual contracting corporation will sell all of its product for a certain number of years to the constituent corporation at a fixed price, and will not sell to anyone else, and will pay a penalty, made so high as to be prohibitory, in case of such unauthorized sales, the purpose and result of which are to create a virtual monopoly in that particular line of business and to prevent any competition therein, is illegal and void. (Mo.) *Finck v. Schneider Granite Co.*, 452.

5. CONTRACTS in Restraint of Trade—Illegal Combinations.—A contract, valid in itself, may become illegal if it is one of several, all of which are links and necessary elements in forming an illegal

combination and monopoly intended to work, and which do work, an injury to the public in unduly raising prices of a commodity, so long as such combination continues. (Mo.) *Finck v. Schneider Granite Co.*, 452.

6. **CONTRACTS in Restraint of Trade—Illegal Combinations.**—If a contract is a continuing one and legal when made, the fact that it is declared illegal as in restraint of trade and as creating a monopoly, under a statute which is a valid exercise of the police power, enacted after the execution of the contract, does not give to such statute a retroactive effect. (Mo.) *Finck v. Schneider Granite Co.*, 452.

7. **COMBINATIONS in Restraint of Trade—Injunction.**—A court of equity will interpose by injunction to prevent the several members of an illegal combination to stifle business from enforcing an agreement, to the injury of one engaged in a competitive business. (Ga.) *Employing Printers' Club v. Doctor Blosser Co.*, 137.

8. **COMBINATIONS in Restraint of Trade.**—A combination of individuals engaged in a particular line of business to compel one engaged in a similar business to sell his product at prices fixed by it is contrary to public policy and void. The members of such a combination, individually or collectively, may by appropriate injunction be restrained from wrongfully interfering with the business of the one who is not a member of the combination. (Ga.) *Employing Printers Club v. Doctor Blosser Co.*, 137.

9. **COMBINATIONS in Restraint of Trade—Liability in Damages.** An overt act in furtherance of an illegal combination to create a monopoly and stifle competition in business, resulting in injury to a third person, is actionable, and the members of the combination are liable to the injured person for all damages proximately flowing from their illegal conduct. (Ga.) *Employing Printers Club v. Doctor Blosser Co.*, 137.

10. **COMBINATIONS in Restraint of Trade—Equitable Relief to Ex-member.**—An ex-member of an illegal combination to stifle trade will not be denied relief in a court of equity against a subsequent illegal act of such combination resulting in damage to him. (Ga.) *Employing Printers Club v. Doctor Blosser Co.*, 137.

11. **COMBINATIONS in Restraint of Trade.**—A combination of individuals to injure a third person in his trade by inducing his employes to break their contract with him and to leave his employment, is illegal, and when it results in damage, actionable. (Ga.) *Employing Printers Club v. Doctor Blosser Co.*, 137.

MORTGAGES.

1. **MORTGAGES—Sale Under Power.**—The right to disaffirm a voidable sale under a power contained in a mortgage is personal to the mortgagor. (Ga.) *Williams v. Williams Co.*, 100.

2. **MORTGAGES—Sale Under Power.**—A creditor of a mortgagor whose judgment is inferior to the mortgage lien cannot, by levy of a common-law execution, subject the mortgaged property to his judgment, when it is held by the mortgagee under a voidable sale under a power contained in the mortgage. (Ga.) *Williams v. Williams Co.*, 100.

MUNICIPAL CORPORATIONS.

Powers—Holding Corporate Stock.

1. **MUNICIPAL CORPORATIONS Have Only the Following Powers:** 1. Those granted by express words; 2. Those necessarily im-

plied or incident to the powers expressly granted; and 8. Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. All doubtful claims of power or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. (Ind.) *Voss v. Waterloo Water Co.*, 201.

2. **MUNICIPAL CORPORATIONS, Power of, to Take Stock in Other Corporations.**—A town or city has no power to become a stockholder in a waterworks or other corporation, or to borrow money by the issuing of bonds or otherwise to pay for such stock, unless express authority to do so is given by statute. (Ind.) *Voss v. Waterloo Water Co.*, 201.

3. **MUNICIPAL CORPORATIONS, Power of, to Take Stock in a Corporation.**—Though a municipal corporation is by statute authorized to subscribe for stock in a waterworks company or association, it is not authorized to subscribe for stock in a corporation to furnish both water and light. (Ind.) *Voss v. Waterloo Water Co.*, 201.

Acts of Officers—Ratification.

4. **MUNICIPAL CORPORATIONS.**—Acts of Officers of a municipality cannot bind it unless they are acting within the scope of the powers expressly granted by its charter, or necessarily incident thereto, or indispensable to the proper exercise of the powers granted. (S. Dak.) *Wilson v. City of Mitchell*, 784.

5. **MUNICIPAL CORPORATIONS—Knowledge of Act of Officer.**—If a city has no knowledge that a well, connected by a city officer with a city water main, is on private property, it is not liable for the water taken from the well, or for the use and occupation of the property. (S. Dak.) *Wilson v. City of Mitchell*, 784.

6. **MUNICIPAL CORPORATIONS—Ratification of Officer's Act.** Payment by a municipality of the bill of a city plumber, for connecting, by order of another city officer, a city water main with a well located on private property, which fact was not known to any city officer, is not such a ratification of the act as to render the city liable for the water taken from the well. (S. Dak.) *Wilson v. City of Mitchell*, 784.

7. **MUNICIPAL CORPORATIONS—Ratification of Unauthorized Act of Officer.**—If a municipality has no authority to connect its waterworks system with a well on private property without the owner's consent, it cannot ratify the act of its officer or agent in making such connection without the consent of the owner. (S. Dak.) *Wilson v. City of Mitchell*, 784.

8. **MUNICIPAL CORPORATIONS—Trespass by Officer—Waiver of.**—If a city is not liable for the trespass of its officer in connecting a private well with its water main, the owner of the well cannot waive the tort, and recover for the value of the water taken and the use of the property, in an action against the city. (S. Dak.) *Wilson v. City of Mitchell*, 784.

Contracts—Lowest Bidders.

9. **MUNICIPAL CORPORATIONS may be Liable upon Implied Contracts** if express contracts would be within the powers of the municipality delegated to it, and the city has ratified the act of its officers. (S. Dak.) *Wilson v. City of Mitchell*, 784.

10. **MUNICIPAL CORPORATIONS—"Work," Contracts for, Meaning of.**—A statute requiring that all contracts for work ordered by the common council of a city shall be let to the lowest, reason-

able and responsible bidder is not restricted to the mere expenditure of physical or mental energy to some corporate end, but includes contracts for bridges and other structures needed by a municipality, to be contracted for according to the merits of competing bidders. (Wis.) Chippewa Bridge Co. v. Durand, 931.

11. MUNICIPAL CORPORATIONS—Contracts of for Work not Let to the Lowest Bidder.—Where a statute provides that work shall be let to the lowest, reasonable and responsible bidder, and that all bids and proposals shall be sealed and directed to the common council and accompanied by a bond, the power to make contracts depends on substantial compliance with the statute, and if a contract is made in some other way, it constitutes no warrant for the disbursement of public moneys. (Wis.) Chippewa Bridge Co. v. Durand, 931.

12. MUNICIPAL CORPORATIONS—Contracts Made in Violation of Law by a Municipal Corporation do not constitute any claim against it, whether such contracts were made in good or bad faith, or constitute good bargains or not, though fully complied with and a taxpayer may maintain an action to prevent the paying out of moneys thereunder, and officers who participate in transferring the possession of money from the city treasury under such contracts are liable to a judgment for its restitution. (Wis.) Chippewa Bridge Co. v. Durand, 931.

13. A MUNICIPAL CORPORATION cannot Ratify a Contract Made in Violation of Its Charter Provisions, unless the acts of ratification would be sufficient to support a contract as an original matter. (Wis.) Chippewa Bridge Co. v. Durand, 931.

14. MUNICIPAL CORPORATIONS—Proposals for Public Work, Necessity for Plans and Specifications.—Where the manner prescribed for letting public contracts includes the element of competition between rival bidders, and cannot be executed in spirit without reasonably definite plans and specifications for the proposed work being provided for the use of bidders, and on notice being given of the facts in some way reasonably calculated to attract the attention of all persons liable to desire to enter the competition, if given an opportunity to do so, then such requirements must be regarded as a part of the law by necessary implication. (Wis.) Chippewa Bridge Co. v. Durand, 931.

15. MUNICIPAL CORPORATIONS—Public Work—Change of Plans and Specifications—New Opportunity for Bidding.—The plans, specifications and terms submitted as a basis for bidding on a contract for public work must not be changed, except in a manner to affect alike all persons bidding and desiring to bid, and if a change of a substantial nature is made either in the character of the proposed structure or the terms of a proposed contract after the first competition shall have been completed, there must be a second opportunity given to bid upon the new basis. (Wis.) Chippewa Bridge Co. v. Durand, 931.

16. MUNICIPAL CORPORATIONS—New Work.—The Requirement that Bids for Public Work Shall be Sent to the Common Council Under Seal implies that the bids are to be opened in the presence of the council and all so treated at the same time, and when they are taken up for consideration, thus, in a measure, precluding publicity as to the contents of the respective bids, and opportunities for collusion between bidders, and negotiations between members of the council and bidders. (Wis.) Chippewa Bridge Co. v. Durand, 931.

17. MUNICIPAL CORPORATIONS—Public Work, Private Negotiations for After Receiving Sealed Proposals.—If, after advertising for and receiving sealed proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the common council has no authority to favor one of the bidders by negotiation with him privately, changing the scope of the work to be done or the terms of payment therefor in consideration of the reduction of his offer. All persons desiring to bid upon the work and willing to comply with the terms prescribed must have equal opportunities to do so; and if the work is not awarded upon the first competition for any legitimate reason, it must be submitted to a second, with full opportunity as before for all persons desiring to participate to do so. (Wis.) Chippewa Bridge Co. v. Durand, 931.

Taxes and Assessments.

18. MUNICIPAL CORPORATIONS.—The Taxes, General or Special, of a Municipal Corporation cannot be Anticipated or Pledged beyond the limit to which it may become indebted, unless the tax has been actually levied and warrants drawn payable out of that fund and be such in effect as to discharge the municipality from liability. (Ind.) Voss v. Waterloo Water Co., 201.

19. STREET ASSESSMENTS—When Unequal and Unjust.—A sewer assessment on a lot eight feet deep at the same rate per front foot as is applied to lots fronting the same street and having a depth of from one hundred and twenty to one hundred and seventy-five feet, is so manifestly unequal and unjust that it will be declared invalid as taking property without due process of law. (Iowa) Iowa Pipe etc. Co. v. Callanan, 311.

20. STREET ASSESSMENTS—Equitable Relief from—Tender.—If an entire assessment against abutting property for street improvements is invalid, the owner is not required to tender any portion thereof as a condition to equitable relief. (Iowa) Iowa Pipe etc. Co. v. Callanan, 311.

21. STREET ASSESSMENTS—Liability of City When Tax Invalid.—If a street assessment against an abutting property owner is illegal, but the work is done under a contract with the city authorized by law and by its ordinances, and the city has received the benefits, a stipulation in the contract that the contractor shall receive assessment certificates in full payment for his work without recourse on the city does not relieve the city from liability on account of the invalid assessment. (Iowa) Iowa Pipe etc. Co. v. Callanan, 311.

22. STREET ASSESSMENTS—Notice.—Different Improvements may be legally noticed in the same document. (Iowa) Iowa Pipe etc. Co. v. Callanan, 311.

Indebtedness.

23. MUNICIPAL CORPORATIONS—Expenses Which do not Constitute Indebtedness Limited by the Constitution.—If a town contracts for water or light or other things which pertain to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly, such contract does not create an indebtedness for the aggregate sum of all such payments, within the meaning of article 13 of the constitution, but if the indebtedness of a town already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness as it comes into existence, including other expenses for which the town is liable, an indebtedness is created in violation of such article. (Ind.) Voss v. Waterloo Water Co., 201.

24. MUNICIPAL CORPORATIONS.—The Effect of a Constitutional Inhibition as to the Creation of Indebtedness is to require the municipal corporation indebted to the limit fixed by the constitution to carry on its corporate affairs while so indebted on a cash basis, and not on credit to any extent or for any purpose. (Ind.) *Voss v. Waterloo Water Co.*, 201.

25. MUNICIPAL CORPORATIONS—Limitations upon Indebtedness.—While the expense for water and light in a town or city is an ordinary and necessary expense, the construction of waterworks or an electric light plant by such town or city is not in any sense an ordinary or necessary expense, but an extraordinary one. There is a clear distinction between a contract for water and light for a public use and one for the construction of a water and light plant to furnish the same. (Ind.) *Voss v. Waterloo Water Co.*, 201.

26. MUNICIPAL CORPORATIONS—Indebtedness, Attempts to Evade Constitutional Restriction of.—A municipal corporation cannot evade the restriction upon its power to become indebted by issuing bonds, payable only out of a fund raised by a special tax levy and collected for that purpose (providing the same are not for special benefits), or payable only out of the rental or income of water or light plant or the other property owned by such corporation, or by buying property subject to liens, although the municipality does not assume or agree in terms to pay such liens, or by providing that such lien shall be paid only out of a special fund raised by taxation for that purpose or only out of the income of such property. (Ind.) *Voss v. Waterloo Water Co.*, 201.

27. MUNICIPAL CORPORATIONS — Indebtedness, Attempt to Evade Constitutional Restriction of.—A municipality which cannot provide for the construction and erection of a plant to furnish water and light for public purposes without creating an indebtedness beyond the constitutional limit cannot evade the constitutional provision by subscribing for stock in a corporation organized for that purpose of furnishing such light and water, and by issuing bonds to raise the money necessary to be used by the corporation, and agreeing to rent certain hydrants at a rate and for terms specified, and to apply the rentals to the payment of the principal and interest of such bonds. Such a scheme is an attempt of the municipality to do by a corporation practically owned by it what it has no power to do, and is prohibited from doing. (Ind.) *Voss v. Waterloo Water Co.*, 201.

28. MUNICIPAL CORPORATIONS, Indebtedness, Attempts to Exceed Constitutional Limit.—It is not Material that there was No Fraud on the part of any of the parties in adopting ordinances or taking other steps in relation to the establishment of a water and light system for a municipality, if it appears that the scheme attempted to be authorized must result in municipal indebtedness in excess of that permitted by the constitution. (Ind.) *Voss v. Waterloo Water Co.*, 201.

Misappropriation of Public Funds—Laches and Limitations.

29. LACHES cannot be Imputed to Taxpayers who are ignorant of the fact that members of a board of supervisors have been misappropriating the public funds. They have a right to presume the contrary, although the books of the board of supervisors are open to inspection, because no duty of inspection rests upon such taxpayers. (Va.) *Johnson v. Black*, 890.

30. LIMITATION OF ACTIONS.—Boards of Supervisors are constructive or implied trustees of counties, and the statute of limitations runs in their favor as to an action brought against them to compel the restitution of public funds illegally diverted by them. (Va.) *Johnson v. Black*, 980.

Streets—Use and Obstruction.

See Nuisances.

31. PUBLIC STREETS—Purposes for Which Dedicated.—The dedication of a public street must be presumed to have been made not for such purposes and usages as were known to the land owner and statute at the time of the dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate. The convenience and advantage of all the inhabitants of the city and of the public at large must be regarded as the objects contemplated when the street was laid out or opened. (Ind.) *Mordhurst v. Fort Wayne etc. Traction Co.*, 222.

32. MUNICIPAL CORPORATIONS—Power to Permit Obstruction of Street.—Power over public streets given to municipal corporations under the ordinary grants in municipal charters does not authorize the municipal authorities, even by express ordinance, to permit the erection in streets of temporary obstructions for purely private gain. (Ga.) *City Council of Augusta v. Reynolds*, 147.

Streets—Abutting Owners—Shade Trees.

33. PUBLIC STREETS.—The Owner of a Lot Abutting on a Public Street, the Fee of Which is in the Municipality, has, by Virtue of proximity, special and peculiar rights, facilities, and franchises in the street not common to the citizen at large. (N. Y.) *Donahue v. Keystone Gas Co.*, 549.

34. PUBLIC STREETS.—The Rights of an Abutting Owner on a public street who does own, and of one who does not own, the fee are practically the same as long as the street is kept open. (N. Y.) *Donahue v. Keystone Gas Co.*, 549.

35. PUBLIC STREETS.—The Maintenance of Trees in a Street for the Purpose of Ornament and Shade is a proper street use, sanctioned both by statute and the custom of the country. They thus maintained are a part of the street, to be enjoyed and used by the public traveling therein, the same as a good roadbed, sidewalk, pavement, or anything else in the street which contributes to the comfort and pleasure of the traveler. (N. Y.) *Donahue v. Keystone Gas Co.*, 549.

36. PUBLIC STREETS, Right of Abutting Property Owner to Recover for Injuries to Shade Trees in.—The owner of residence property abutting on a public street, though he does not own the fee thereof, has such an interest in ornamental shade trees standing in such street in front of his land that he may recover as damages the amount which the value of his land is reduced by the killing of such trees through the negligent acts of a gas company in permitting its gas to escape from pipes in the soil about their roots. (N. Y.) *Donahue v. Keystone Gas Co.*, 549.

Streets—Additional Servitudes—Railways.

37. PUBLIC STREETS, Additional Servitudes in.—An Interurban Street Passenger Railway, with the necessary turnouts, switches, feed wires and poles in and along a public street, though authorized to

transport light express matter, passengers, baggage and United States mails, does not impose any additional servitude on the street, entitling abutting property owners to compensation. (Ind.) *Mordhurst v. Fort Wayne etc. Traction Co.*, 222.

38. PUBLIC STREETS—Damage to Private Citizens by Construction of Railways in.—When a railway is constructed and maintained in front of one's land abutting on a public street, he may recover damages of the railroad company for such destruction and impairment of his rights and easements in the street caused by the railway as constitute damage peculiar to himself and independent of such as he sustains in common with the public. (Cal.) *Smith v. Southern Pac. R. R. Co.*, 17.

39. PUBLIC STREETS, Damages for Construction of Railway Where no Change of Grade Results.—The fact that a railroad constructed in a public street in front of one's premises is flush with the surface of the ground and does not cause any change of grade, nor compel him to go either up or down in going from his land to the street, does not show that he could not have suffered from its construction damage peculiar to himself and different from that sustained by the public, where such railroad is constructed and maintained so near his premises that teams cannot be hitched in front thereof. (Cal.) *Smith v. Southern Pac. R. R. Co.*, 17.

40. PUBLIC STREETS.—The Necessity for Constructing a Railroad in a Public Street Close to the Line of the Lands of a Private Proprietor does not relieve the railroad company from liability for such damages as may result to him from such construction and the subsequent maintenance of the road. (Cal.) *Smith v. Southern Pac. R. R. Co.*, 17.

Streets—Nonuser, Estoppel, and Limitations.

41. MUNICIPAL CORPORATIONS—Loss of Public Right—Nonuser of Street.—While a city does not lose its rights in a public street by mere nonuse, yet if there are other circumstances, which are sufficient, together with the nonuser, to raise a presumption of abandonment, such rights are to be deemed lost. (Ill.) *People v. Rock Island*, 179.

42. MUNICIPAL CORPORATIONS.—Doctrine of estoppel in pais is applicable to municipal corporations, but they will be estopped or not, as justice and right may require. (Ill.) *People v. Rock Island*, 179.

43. MUNICIPAL CORPORATIONS—Equitable Estoppel.—If a person acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied against such city. (Ill.) *People v. Rock Island*, 179.

44. MUNICIPAL CORPORATIONS—Estoppel to Assert Rights in Street.—If a city, for a valuable consideration, has granted to a railway company the right to erect structures and lay tracks on a public street, and the company, in reliance on such grant, has incurred great expense in making permanent improvements in the street, leaving a portion thereof free, sufficient for unobstructed travel, and the public has acquiesced in such condition of the street for many years, the city, the public or a private person, is estopped to assert any right to have such improvements removed. (Ill.) *People v. Rock Island*, 179.

Streets—Unsafe Condition.

45. MUNICIPAL CORPORATIONS—Liability and Duty Respecting Public Streets.—All cities and towns in Iowa are required to keep the streets and public places within their limits and which are open for public use free from dangerous obstructions and pitfalls and in reasonable repair, and the requirement is broad enough to cover not only the purposes of public travel, but any use to which a street may be subjected not in its nature violative of any established rule of law. (Iowa) *Nocks v. Town of Whiting*, 371.

46. MUNICIPAL CORPORATIONS—Public Streets, Liability for Animals Injured upon.—If a horse escaping momentarily from the control of its owner and running over public streets steps into a hole in the surface thereof, resulting in injury to the animal, such owner may recover of the municipality the damages, if it was negligent in permitting such street to be out of repair. (Iowa) *Nocks v. Town of Whiting*, 371.

47. PUBLIC STREETS, Negligence in Maintaining Trapdoor in.—Where the owner of a building and his tenants maintain a cellarway from a traveled street to a basement with a trapdoor therein, which they leave open without railing or guard, they are guilty of negligence, and whether the city is also guilty of a like negligence is a question for the jury depending upon the method of construction and the use made of the streets and the number of times the door had been left open and unguarded, and other relevant facts and circumstances of the case. (Iowa) *Earl v. Dlack*, 361.

48. MUNICIPAL CORPORATIONS, Liability of for Open Trapdoor not Approached from the Street.—Where a trapdoor is left open in an areaway not wholly within the street, the fact that a person injured by falling through such doorway did not approach it from the street, but from the abutting property, does not exonerate the city from liability to him, where the opening is such as to constitute a menace to all who use the street. (Iowa) *Earl v. Dlack*, 361.

49. NEGLIGENCE, Contributory, Plaintiff, When not Guilty of.—One who, on a dark night, falls through a trapdoor in an areaway on or immediately adjoining a public street is not to be adjudged guilty of contributory negligence because he did not discover the peril before he was injured. He had the right to assume that there were no such pitfalls in a place where he might rightfully travel. (Iowa) *Earl v. Dlack*, 361.

50. PUBLIC STREETS, Care to be Exercised in Using.—One is not bound to be looking for hidden dangers in a public street. All that is required of him is that he walk with his eyes open, observing his general course and in the usual manner. (Iowa) *Earl v. Dlack*, 361.

Smoke Ordinance.

51. MUNICIPAL ORDINANCE Against Smoke.—A municipal ordinance prohibiting the emission of "dense smoke" from chimneys within the corporate limits of a city is within the valid exercise of the police power, and may be enforced. (Minn.) *St. Paul v. Haugbro*, 427.

Official Records—Extrinsic Evidence.

52. MUNICIPAL CORPORATIONS—Parol Evidence.—Evidence Aliunde the Official Record is not permissible to show the proceedings of a municipal corporation, where the law requires such a record to be kept, where the admission of such evidence will have

the effect to vary or contradict the record, but such evidence is receivable for the purpose of showing occurrences which, through oversight or other cause, were not recorded. (Wis.) Chippewa Bridge Co. v. Durand, 931.

53. MUNICIPAL CORPORATIONS, Correcting Records of.—If the record of a municipal corporation incorrectly states the time to which a meeting of the common council was adjourned, the only way to proceed to make competent evidence thereof is, first, to have its clerk amend its record, if he will, to conform to the facts; and second, if he refuses, to coerce him to do so by mandamus proceedings. (Wis.) Chippewa Bridge Co. v. Durand, 931.

Limitation of Actions.

54. LIMITATION OF ACTIONS—Municipal Corporations.—The statute of limitations runs against counties or other political subdivisions of a state in the same manner and to the same extent as against natural persons. (Va.) Johnson v. Black, 890.

Note.

Murder, coercion as a defense in prosecutions for, 722.

NAVIGABLE WATERS.

1. NAVIGABLE WATERS.—Each Shore Owner, as Against the Others, is Entitled to his proportion of the line abutting navigable water for contact with navigation and to a direct course over intervening shallows, to construct piers and other structures connecting the shore with such navigable line. (Wis.) Thomas v. Ashland etc. Ry. Co., 1000.

2. NAVIGABLE WATERS, Rights of Shore Owners.—No Departure will be Made from the Ordinary Method of Appointment and Delimitation by straight lines between adjoining shore owners, unless such variation or departure is necessary to substantial equality between them. (Wis.) Thomas v. Ashland etc. Ry. Co., 1000.

3. NAVIGABLE WATERS—Rights of Shore Owners.—When the Irregularities or Curvatures of the Shore are Such that Lines cannot be Drawn at Right Angles to the Shore for the purpose of making a proportional division of the navigable waters among the shore owners, then the whole cove is to be treated as a unit of the shore line by drawing perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of each so apportioned share of navigable water line to the respective termini of the corresponding shore line pertaining to each owner. The dominant rule is that each must have his due proportion of the line bounding navigability and a course of access to its exclusive of every other shore owner, and all rules for apportionment or division are subject to such modification as may be necessary to accomplish substantially this result. (Wis.) Thomas v. Ashland etc. Ry. Co., 1000.

NEGLIGENCE.

Degrees of Negligence.

1. NEGLIGENCE, Whether Termed Slight, Ordinary, or Gross, is but the omission of duty, and, if actionable, entails but one measure of liability, unless willful or intentional, and it then assumes

an entirely different character from that of mere negligence in its ordinary meaning. (Ill.) Chicago etc. Ry. Co. v. Hamler, 187.

2. **NEGLIGENCE** is of Two Kinds Only, mere negligence which consists of carelessness and inattention, and willful negligence consisting of willful and intentional failure or neglect to perform a duty. (Ill.) Chicago etc. Ry. Co. v. Hamler, 187.

3. **NEGLIGENCE—Comparative.**—If injury results from failure to exercise ordinary care and not from willful or intentional failure to perform a duty, the question of the degree of negligence is of no importance. (Ill.) Chicago etc. Ry. Co. v. Hamler, 187.

4. **NEGLIGENCE—Comparative**—Negligence, or the failure to exercise ordinary care, skill, and diligence, cannot be divided, into the classes of slight, ordinary and gross, and the only question in any case is whether there is actionable negligence, and if there is, the rights of the parties are not affected by any question of the degree of such negligence. (Ill.) Chicago etc. Ry. Co. v. Hamler, 187.

Proximate Cause.

5. **TORTS—Intervening Act of Innocent Person.**—If a wrong is naturally calculated, through the intervention of an innocent human agency, to injure third persons, the wrongdoer is responsible for such injuries. (Mich.) Skinn v. Reuter, 384.

6. **TORTS Intervening Act of Innocent Person.**—If one does a wrong imminently dangerous to human life which, through the intervention of an innocent human agency, causes injury to property, the wrongdoer is liable for such injury. (Mich.) Skinn v. Reuter, 384.

7. **NEGLIGENCE—Intervening Act or Agency, When does not Relieve from Liability.**—Where there is an intervening agency, the intervening act of an independent, voluntary agent does not arrest causation nor relieve the person doing the first wrong from the consequences thereof, if such intervening act was one which would ordinarily be expected to flow from the act of the first wrongdoer. (Iowa) Burk v. Creamery Package Mfg. Co., 377.

8. **JURY TRIAL—Instructions.**—The Use of the Term "Proximate Cause" Without Otherwise Defining It in an instruction is not erroneous. (Iowa) Burk v. Creamery Package Mfg. Co., 377.

9. **NEGLIGENCE.**—Where Several Proximate Causes Contribute to an Accident and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless, without its operation, the accident would not have happened. (Iowa) Burk v. Creamery Package Mfg. Co., 377.

10. **NEGLIGENCE—Unforeseen Consequences.**—It is not necessary to a defendant's liability for negligence that the consequences thereof should have been foreseen. It is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the wrong; such injuries as are likely under ordinary circumstances to ensue from the act or omission in question. The test is, Would ordinary prudence have suggested to the person charged with negligence that his act or omission would probably result in injury to some one? The particular result need not be such as that it should have been foreseen. (Iowa) Burk v. Creamery Package Mfg. Co., 377.

11. **NEGLIGENCE—Proximate Cause.**—Where the trolley pole of a car slips from the wire at a curve in the street and strikes an electric light, causing the globe to fall to the ground, the placing

of the light in close proximity to the trolley wire is not the proximate cause of an injury to a person in the street from the falling globe. (R. I.) *Nelson v. Narragansett Elec. Co.*, 711.

12. JURY TRIAL—Instructions, When do not Remove the Doctrine of Proximate Cause from a Case.—An instruction to the jury that the fact that employes of a creamery knew a jug contained sulphuric acid would not relieve the defendant from a charge of negligence, provided he sold and delivered the acid without complying with the statute requiring it to be labeled as poisonous, does not remove the doctrine of proximate cause from the case. The instruction is good as far as it goes, and is unobjectionable if the question of proximate cause is fully and correctly covered by other instructions. (Iowa) *Burk v. Creamery Package Mfg. Co.*, 377.

Sale of Poison.

13. NEGLIGENCE.—The Violation of a Statute making it criminal for one person to deliver to another any poisonous liquor or substance without having the word "poison" and the true name thereof written or printed upon a label attached to or affixed upon the vial, box, or parcel containing the same, is negligence. (Iowa) *Burk v. Creamery Package Mfg. Co.*, 377.

14. NEGLIGENCE, Liability for, When not Relieved by Subsequent Negligence of Another.—Where the seller of a poison is guilty of negligence in not labeling it as required by statute and injury is caused to another thereby, the former is not relieved from liability by the fact that the purchaser of the poison was also guilty of negligence in leaving it, without any label, in a place where it was likely to injure others. (Iowa) *Burk v. Creamery Package Mfg. Co.*, 377.

15. NEGLIGENCE, Poisonous Articles, Liability of One Selling Without Labeling.—If a person sells sulphuric acid without labeling the same as required by statute to indicate that it is a deadly poison, and such sale is made to the proprietor of a creamery, where it is customary to put buttermilk in jugs for the use of customers and employes, similar to one in which the acid is placed, and such jug is placed by the purchaser in his creamery alongside of a similar jug containing buttermilk, and a person seeing the jug and asking for buttermilk is by an employe of the creamery invited to drink, and in response to the invitation, instead of taking the jug containing the buttermilk, takes a drink from the one containing the acid, resulting in his death, the negligent act of the seller in not labeling the poison may be regarded as the proximate cause of such death, and he is liable therefor. (Iowa) *Burk v. Creamery Package Mfg. Co.*, 377.

16. NEGLIGENCE, Contributory, in Drinking Poison.—One who visits a creamery and drinks from a jug containing sulphuric acid in the belief that it was buttermilk, there being no label thereon, cannot be held to have been guilty of contributory negligence as a matter of law. (Iowa) *Burk v. Creamery Package Mfg. Co.*, 377.

Sale of Diseased Animals or Meat.

17. TORTS—Sale of Diseased Animals.—If the owner of hogs, knowing them to be afflicted with a dangerous infectious disease, sells them to livestock dealers who, in ignorance of the condition of the animals, sell them to a third person who, without negligence, puts them with other hogs, the original vendor is liable to the last purchaser, not only for the value of the hogs purchased, but for the value of those which contract the disease and die. (Mich.) *Skinn v. Reuter*, 384.

18. NEGLIGENCE—Proximate Cause—Sale of Putrid Meat.—If a butcher sells a meat carcass to a retailer, and the retailer's clerk, subsequently discovering that the meat is putrid, cuts it up to dispose of it, and in so doing contracts blood poisoning through a recent cut in his hand, the negligence or wrongdoing of the vendor is not the proximate cause of the injury. (Mich.) *Williams v. Wiedman*, 400.

See Death; Electricity.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

1. NEW TRIAL.—Newly Discovered Evidence does not Require the Granting of a New Trial where it is cumulative and impeaching testimony bearing upon the issues actually litigated, nor where the moving party did not use due diligence to secure such evidence at the trial. (Wis.) *Clithero v. Fenner*, 978.

2. NEW TRIAL, Discretion of the Court.—The granting or refusing of a new trial upon newly discovered or impeaching evidence rests largely in the discretion of the trial court. (Wis.) *Clithero v. Fenner*, 978.

NUISANCE.

1. NUISANCE, PUBLIC—Obstruction of Street.—Any temporary obstruction in a public street is presumptively a public nuisance, and it is incumbent upon the person responsible for the presence of such obstruction to show that it was placed in the street in furtherance of a lawful and legitimate purpose, and has not been continued for a longer time than was reasonably necessary. (Ga.) *City Council of Augusta v. Reynolds*, 147.

2. NUISANCE, PUBLIC—Street Fair.—The use of a large portion of a business street by private individuals for their own pecuniary benefit, for the purposes of a street fair, consisting of numerous tents, including shows and exhibitions, together with various stands, booths and structures for the amusement of the public and the private gain of the owners, and by which the public is deprived for several days of the right to use that portion of the street for traffic or travel, is an aggravated public nuisance, which cannot be authorized by the city authorities, and which may be enjoined. (Ga.) *City Council of Augusta v. Reynolds*, 147.

3. NUISANCE, PUBLIC—Obstruction of Street—Injunction.—A court of equity has jurisdiction, upon the proper information filed, to restrain the erection or continuance of a public nuisance in a public street. (Ga.) *City Council of Augusta v. Reynolds*, 147.

OFFICERS.

In General.

1. PUBLIC OFFICERS, Good Faith of, When does not Protect. In an action against public officers for paying out money under a contract entered into in defiance of the charter of a municipal corporation, they are not relieved from liability by a finding that in making the contract they acted in the utmost good faith. If officers knowingly or willfully use moneys contrary to law, but otherwise

to accomplish a legitimate municipal purpose, they are guilty, in a legal sense, of acting in bad faith and of an actionable misappropriation of such money, regardless of their good intention. (Wis.) Chippewa Bridge Co. v. Durand, 931.

2. OFFICE AND OFFICERS—Compensation.—A person who accepts an office with a fixed salary is bound to perform the duties of the office for the salary and cannot legally claim additional compensation for the discharge of those duties, even though the salary be very inadequate. (Va.) Johnson v. Black, 890.

Deputies.

3. OFFICE AND OFFICERS—Powers of Deputies.—Clerks of county courts are authorized to appoint deputies, who are vested with all power and authority of the principal, and whose acts are the acts of the principal by his lawfully appointed agent. (Tenn.) Wilkerson v. Dennison, 821.

4. OFFICE AND OFFICERS.—Deputy Clerks of County Courts are authorized to take and certify the acknowledgment of deeds in both the names of their principal and of themselves as deputies, or either. (Tenn.) Wilkerson v. Dennison, 821.

5. OFFICE AND OFFICERS—Acknowledgment by Deputy.—An acknowledgment of a deed taken before a deputy county clerk, with the certificate made and signed by him in his own name, without the name of his principal appearing, is valid. (Tenn.) Wilkerson v. Dennison, 821.

6. OFFICE AND OFFICERS—Acknowledgment by Deputy.—An acknowledgment, and privy examination of a married woman to her deed, taken before a deputy county court clerk, with the certificate made and signed by him in the name of his principal is valid, though such deputy's name does not appear. (Tenn.) Wilkerson v. Dennison, 821.

Note.

Officers, deputy, acknowledgment of deeds taken by, 828, 829.

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OIL LANDS.

See Eminent Domain.

OPTIONS.

See Vendor and Vendee.

PARENT AND CHILD.

PARENT AND CHILD—Action to Compel the Former to Support the Latter.—It is to be presumed that a father will provide for the maintenance and education of his minor daughter in proportion

to his ability and her needs, and until he refuses to do so, neither she, nor anyone for her, has any right of action against him to compel him to make such provision. (Iowa) *Foot v. De Poy*, 365.

PARI DELICTO.

See Contracts, 4-6.

PAROL TESTIMONY.

See Evidence, 3-5.

PARTITION.

1. **PARTITION—Time of Bringing Suit for.**—A suit for the partition of land brought by a devisee under a will cannot be defeated as having been prematurely commenced, by the fact that some of the heirs or devisees are minors, and the will may be contested within five years after they reach the age of majority. (Mo.) *Robertson v. Brown*, 485.

2. **PARTITION—Time of Bringing Suit for.**—Partition of land devised may be had before the period limited for contesting the will has expired. (Mo.) *Robertson v. Brown*, 485.

3. **PARTITION—Necessary Parties—Contingency.**—A phrase used in a statute requiring every person to be joined in a partition suit "who upon any contingency may be or become entitled to any beneficial interest in the premises," does not require that every person who by any future possibility may have an interest in the land, should be made a party. Such statute refers to such contingent interests as are recognized by the law as estates to take effect in future upon the happening of an uncertain event and the like, and the right to contest a will is not such contingency as is referred to in the statute. (Mo.) *Robertson v. Brown*, 485.

4. **PARTITION—Necessary Parties.**—A minor legatee under a will who has a right to contest its validity is not a necessary party to a partition suit by a devisee under the will. (Mo.) *Robertson v. Brown*, 485.

PAYMENT.

See Accord and Satisfaction.

PERMANENT EMPLOYMENT.

See Attorney and Client, 2.

PHYSICIANS AND SURGEONS.

1. **PRACTICE OF MEDICINE—State Regulation of.**—The right to practice medicine is subject to such reasonable regulations or conditions as the state, in the exercise of the police power, may prescribe. (Ohio St.) *State v. Marble*, 570.

2. **PRACTICE OF MEDICINE—Christian Science Treatment.**—Prescribing, for a fee, Christian Science treatment for the cure of disease is practicing medicine within the meaning of the statutes of Ohio regulating such practice. (Ohio St.) *State v. Marble*, 570.

3. **PRACTICE OF MEDICINE—Christian Science—Constitutional Law.**—A statute making the right to treat disease, for a fee,

dependent upon the possession of reasonable qualifications, is not unconstitutional, in its application to a Christian Science practitioner, as an interference with the right to worship God according to the dictates of his conscience. (Ohio St.) *State v. Marble*, 570.

4. PRACTICE OF MEDICINE—Christian Science—Constitutional Law.—A statute regulating the practice of medicine, which excludes no one possessing reasonable qualifications, is not unconstitutional as discriminating against Christian Scientists, in that it makes no special provision for them, while it provides that anyone possessing certain qualifications may practice osteopathy. (Ohio St.) *State v. Marble*, 570.

PLEADING.

1. ACTIONS—Construction of Pleading.—If plaintiff has a right to elect to sue either upon a contract or for a tort arising out of a breach of duty under the contract, the petition, if equivocal in its terms, will be construed as claiming damages for the tort. (Ga.) *Central Ry. Co. v. Chicago Portrait Co.*, 87.

2. PRACTICE—Leave to Amend Complaint.—It is error, on a trial, when it is shown that a contract made for public work with a bridge company was materially different from its bid, to refuse to permit an amendment to the complaint setting forth this fact, if there is no room for holding that the plaintiff was guilty of laches in not bringing the fact to the attention of the court earlier, and it is perfectly apparent that the fact has some bearing upon the responsibility of the defendants. (Wis.) *Chippewa Bridge Co. v. Durand*, 931.

See Appeal and Error; Corporations, 1; Equity.

POISONS.

See Negligence, 13-16.

POWER OF ATTORNEY.

See Principal and Agent.

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Precatory Trusts, absolute devise or bequest, when not affected by precatory words, 519, 520.

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PRINCIPAL AND AGENT.

POWERS OF ATTORNEY—Registration—Constructive Notice.
A power of attorney executed in the same manner that a deed subject to registry must be executed may be recorded immediately upon its execution, and whenever a conveyance subsequently made under the authority of such power is thereafter duly recorded, the power of attorney and the deed should be considered as recorded with each other, and they become constructive notice from that date, and the power of attorney is admissible in evidence under the same rules as the deed. (Ga.) *Flint River Lumber Co. v. Smith*, 85.

PRINCIPAL AND SURETY.

1. SURETYSHIP—Promise to Pay Debt of Another.—Where one for a sufficient consideration agrees to pay the debt of another, the promisor becomes the principal obligor and the promisee the surety; and if the creditor accepts the promise, he becomes bound to observe the relation of principal and surety existing between such parties. (Iowa) *Malanaphy v. Fuller etc. Mfg. Co.*, 332.

2. SURETYSHIP—Release of Surety.—If a Purchaser of a business assumes and agrees to pay a debt of the vendor evidenced by a note, and the creditor declines to accept the purchaser's note, but does accept a note executed by both the purchaser and the vendor, without surrendering the original note, a discharge of the purchaser from liability releases the original debtor also. (Iowa) *Malanaphy v. Fuller etc. Mfg. Co.*, 332.

PRIVACY.

See Civil Rights.

PROBATE COURTS.

See Courts; Descent and Distribution; Equity, 8-12; Executors and Administrators.

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sales, orders of, relief in equity from, 642.

PROCESS.

1. PROCESS—Motion to Quash—Waiver.—If a motion to quash a summons is based upon a ground which is in bar of the action, such motion is waiver of all defects in the summons and in the return thereon. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

2. PROCESS—Motion to Quash—Waiver of Defects.—If process is illegally issued or executed, the validity of the process or return can be raised by a motion to quash, or by a plea in abatement, but if such motion is not made and disposed of before appearing to the action, or before taking or consenting to a continuance, the party waives all defects in the process and the service thereof. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

3. PROCESS—Motion to Quash—Statute of Limitations.—Even if the action has been barred by limitation, that question cannot be raised by a motion to quash the process. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

See Justice of Peace.

PUBLIC FUNDS.

See Equity, 13, 14.

PUBLIC LANDS.

1. MINES AND MINING — Townsite Patents.—The officers of the land department, in issuing a townsite patent, must necessarily pass upon the mineral or nonmineral character of the land, and the patent issued by the government can be attacked only by a direct proceeding by or under the direction of the government of the United States. (S. Dak.) *Board of Education of Deadwood v. Mansfield*, 771.

2. DEEDS—Conveyance Before Patent—Notice.—Under a statute providing that every grant of real property is conclusive against the grantor, and everyone claiming under him, except a bona fide purchaser or encumbrancer who acquires a title or lien by an instrument first duly recorded, and that the recording and deposit of any instrument for record shall be constructive notice of the execution of such instrument to all subsequent purchasers and encumbrancers, if an entryman on public land conveys it by deed before receiving a patent therefor and such deed is immediately recorded, and after the issuance of the patent the grantor mortgages the land to a third person, the mortgagee is bound to take notice of the record of the deed, and acquires no interest as against the grantee therein. (S. Dak.) *Bernardy v. Colonial etc. Mortgage Co.*, 791.

3. PUBLIC LANDS—Title Under Timber Culture Act Before Full Compliance.—The initiatory steps taken to secure title to public land under the timber culture act do not constitute a grant in praesenti of the premises selected, but are equivalent to impelling the United States constantly to offer to the entryman a patent for the land if he fully complies with the conditions required. (Or.) *Kelsay v. Eaton*, 662.

4. PUBLIC LANDS, Devisable Interest in, When does not Exist. An Entryman Under the Timber Culture Act of the United States has not, before receiving a final certificate, a devisable interest in the land. (Or.) *Kelsay v. Eaton*, 662.

5. PUBLIC LANDS—Title of Heirs of Entryman.—Under the timber culture act, if an entryman dies before having fully complied with the law, his heirs may obtain title on complying with certain conditions, but they take by purchase and not by descent, and hence are not affected by any devise made by him. (Or.) *Kelsay v. Eaton*, 662.

See Deeds, 2.

PUBLIC POLICY.

PUBLIC POLICY.—In Order to Ascertain the public policy of a state in respect to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create a public policy. (Ill.) *Raison v. Chicago etc. Ry. Co.*, 153.

PUBLIC STREETS.

See Highways.

RAILROADS.*Crossings.*

1. **RAILROADS—Mode of Constructing Crossings.**—The Statute passed May 10, 1902, by the Ohio legislature, which authorizes the court of common pleas to define the mode by which one railroad may cross another, is original legislation, in force and effect from and after its passage, and pending actions and proceedings are not exempt from its operation by reason of the provisions of section 79 of the Revised Statutes. (Ohio St.) *Wheeling etc. R. R. Co. v. Toledo Ry. etc. Co.*, 622.

Fires.

2. **RAILROADS—Liability for Fires.**—When it is established that a fire was set out by sparks from the engine of a railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had availed itself of the best mechanical contrivances and inventions in known practical use, to prevent the burning of property by the escape of fire, and had exercised every reasonable precaution, in selecting competent employes, and in operating its trains. (Va.) *Norfolk etc. Ry. Co. v. Fritts*, 911.

3. **RAILROADS—Duty to Prevent Fires.**—It is the duty of a railroad company to exercise every reasonable precaution to avoid injury to others, by scattering fire along its right of way, and when the danger of doing such injury is increased by the nearness of wooden buildings to its track, the accumulation of combustible material, either on its own or the adjoining land, the dryness of the season, and the direction of high winds, greater caution is required than is necessary when such conditions do not prevail. (Va.) *Norfolk etc. Ry. Co. v. Fritts*, 911.

4. **RAILROADS—Liability for Fires.**—Unusual and unnecessary high speed of a railroad train, and the resulting emission of an unusually great quantity of sparks and cinders from the engine may become negligence on the part of the railroad company. It must, in regulating such speed take cognizance of the dryness of the season, the strength and direction of the wind, the danger to adjoining property from fire, and of any surrounding circumstances which increase the danger to others from fire thrown out by its engines. (Va.) *Norfolk etc. Ry. Co. v. Fritts*, 911.

See Carriers; Eminent Domain; Mechanic's Lien.

Note.

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See Highways.

Rape, wife not competent to prove commission of by husband prior
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RECEIVERS.

1. RECEIVERS — Corporations—Dissipation of Assets.—Equity
will not appoint a receiver for a corporation, at the suit of one
who has simply brought an action for damages against it, on the
ground that it is exhausting its assets and turning the proceeds
into dividends in order to defeat plaintiff's claim and prevent him
from collecting any judgment which he may obtain. (Tenn.) Slover
v. Coal Creek Coal Co., 851.

2. RECEIVERS—Corporations—Actions for Torts.—The power of
equity cannot be invoked in behalf of persons suing in tort, to the
end that the property of the corporation may be held and managed
by a receiver, to await the decision of such action at law to
prevent waste of the corporate property in the meantime, with a
view to having it ready to turn over in satisfaction of such judg-
ment as may be obtained in the action at law. (Tenn.) Slover v.
Coal Creek Coal Co., 851.

RES JUDICATA.

See Judgments, 4, 5.

RESTRAINT OF TRADE.

See Monopolies and Combinations.

RIGHT OF PRIVACY.

See Civil Rights.

RUBBER-STAMP SIGNATURES.

See Justice of Peace.

SALES.

In General.

1. A SALE "F. O. B." Cars Imposes on the Seller the Duty of
Obtaining Cars upon which the subject of the sale is to be loaded.
(Wis.) Vogt v. Schienebeck, 989.

2. SALES—Right of Inspection.—Ordinarily, a purchaser of a
commodity has the right of inspection upon delivery before ac-
ceptance, and if it does not correspond in kind, quality, condition,
or amount to that which was contracted for, he may reject it, but
if he rejects when it comes up to the stipulated standard, he does
so at his peril, and the seller may recover the purchase price on
proof of his compliance with the contract of sale. (Or.) Livesley
v. Johnston, 647.

3. SALE, Right to Reject, When may not be Capriciously Exer-
cised.—If a contract for the sale of hops to be grown in the future

provides if they are, or shall in any case be, of lesser quality than choice, or not delivered in the condition agreed upon, the purchaser or his agents, after first determining that they are not choice or in good condition, shall be released from all further obligation on such contract, this does not entitle him to reject the hops capriciously or without sufficient reason. (Or.) *Livesley v. Johnston*, 647.

Sales in Bulk—Statute.

4. **CONSTITUTIONAL LAW—Sales in Bulk Statute.**—A statute making it unlawful for any merchant while indebted to any person who has in good faith given him credit for merchandise sold to him, or money to be used in the conduct of his business, to sell his entire stock, or the major part thereof in bulk, and with the intention of ceasing to do business in the same manner and place as theretofore, without first making a full and complete inventory of the merchandise to be sold and a correct schedule of such creditors, and giving them written or printed notice of any such proposed sale, and providing that if such sale be made without complying with such statute, it shall be deemed void as against such creditors and liable to their claims, and if any part of the property is withdrawn by the purchaser, he is personally liable to such creditors to the extent of its value, is in violation of the fourteenth amendment to the constitution of the United States as class legislation, favoring one class of creditors by granting them superior rights, and denying all others the equal protection of the laws. (Ind.) *McKinster v. Sager*, 268.

Damages for Breach of Contract.

5. **SALE, Damages for Breach of Contract of.**—In an Action to Recover Damages for the Breach of an Executory Contract to Sell and Deliver Goods, the difference between the market price of the goods at the time and place specified in the contract for delivery and the contract price is ordinarily the measure of damages. (Wis.) *Vogt v. Schienebeck*, 989.

6. **SALE, Breach of Contract of—Damages, When Controlled by the Place to Which Shipment is to be Made.**—If a contract for the sale of personal property stipulates for its delivery at a designated place, and it is known that the purchaser proposes to ship it to another place, and, on breach of the contract to deliver, such property cannot be obtained at such place of delivery, the measure of damages is the difference between the value of the property at the place to which it was shipped, and the contract price, less what it would cost for inspection fees and freight, had the contract been performed, with interest on the principal sum at the regular rate from the time of the breach to the date of the recovery. (Wis.) *Vogt v. Schienebeck*, 989.

See Negligence, 13-18.

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Servitudes, definition of, 240.

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SHERIFF.

See Attachment.

SIGNATURES.

See Contracts, 3; Justice of Peace; Wills, 4-10.

SLEEPING-CAR COMPANIES.

See Carriers, 13-15.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—Contract, When not Unilateral. The fact that a contract for the sale and purchase of hops gives the purchaser or his agent the right to determine whether they are of a quality and condition provided for in the contract and then to refuse to receive them, does not make the contract unilateral. It is not a mere option, but a positive obligation, to purchase, unless in the honest judgment of the purchaser or his agents, fairly exercised, the hops are not of the quality or not in the condition contracted for. (Or.) *Livesley v. Johnston*, 647.

2. SPECIFIC PERFORMANCE of a Contract to Deliver Chattels will not ordinarily be granted, for the reason that there is a plain, speedy, and adequate remedy at law. (Or.) *Livesley v. Johnston*, 647.

3. SPECIFIC PERFORMANCE of a Contract to Deliver Chattels will be Decreed if an award of damages will not put the complainant in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages must fall short of the redress to which he is entitled. (Or.) *Livesley v. Johnston*, 647.

4. SPECIFIC PERFORMANCE of a Contract to Deliver Chattels cannot be Maintained Solely on the Ground that the Vendor is Insolvent, but the fact of insolvency, when combined with other causes for equitable interposition, may become a potent, and even a controlling, factor in determining the fact of jurisdiction. (Or.) *Livesley v. Johnston*, 647.

5. SPECIFIC PERFORMANCE of a Contract for the Sale of Hops.—A contract whereby the vendor sells hops to be grown by him for a series of years, to be of choice quality and in good condition, such quality and condition to be determined by the purchaser, who stipulates to make advances at designated times in each year for the cultivation and picking of the hops, and to pay nine and a half cents per pound therefor when delivered, will be specifically enforced at the suit of the purchaser, if the hops have been produced, especially when the seller is insolvent. (Or.) *Livesley v. Johnston*, 647.

6. SPECIFIC PERFORMANCE of a Contract for the Sale of Hops to be Produced in the Future will not be Denied on the ground that it does not appear that the seller, at the time of entering into the contract, owned the land on which the hops were to be raised, or had a lease thereof, or otherwise had a potential interest in the crop to be produced. This will be presumed. (Or.) *Livesley v. Johnston*, 647.

7. SPECIFIC PERFORMANCE will not be Denied on the Ground that the Seller has not Produced Articles of the Quality Contracted for, if it appears that the purchaser is willing to accept what the defendant has produced. (Or.) *Livesley v. Johnston*, 647.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

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STENOIL SIGNATURE.

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SURETYSHIP.

See Principal and Surety.

TAXATION.

TAXATION, Exemption from—Benevolent Purpose, What is not.—A clubhouse and lodge building held by a local lodge of the Benevolent and Protective Order of Elks, and used for their meetings and for the accommodation of lodge members and their families for fraternal and social intercourse, and as a place of entertainment and amusement, with buffet and dining-room accommodations for refreshments, are not exempt from taxation under a statute exempting the property owned by any religious, scientific, literary, or benevolent association, if not leased or used for other pecuniary profit, where the accommodation for the entertainment, amusement and refreshment of members and their families and guests is maintained by a system of charges to members regulated with a view to covering the expense, any profit resulting being paid into the treasury. (Wis.) *Green Bay Lodge v. Green Bay*, 984.

See Commerce; Municipal Corporations, 18-22.

TELEGRAPHS AND TELEPHONES.

1. **TELEGRAPH COMPANY—Mistake in Quoting Prices.**—If a telegraph company, in transmitting a message, changes the market price of mules as stated therein, and quotes them at a lower figure, thereby inducing the sendee to direct the purchase of a number of mules, the measure of damages is the difference between the price paid, and the price stated in the telegram as delivered. (S. C.) *Hays v. Western Union Tel. Co.*, 731.

2. **TELEGRAPH COMPANY—Time to Present Claim.**—Waiver is a voluntary relinquishment of a known right, and does not require a new contract upon consideration to be effectual against a stipulation in a contract for the transmission of a telegram that claims for damages must be presented within sixty days. (S. C.) *Hays v. Western Union Tel. Co.*, 731.

3. TELEGRAPH COMPANY—Waiver by Local Agent.—A local telegraph operator to whom the company intrusts the duty and responsibility of getting up all possible information in case a claim is made against it for damages, has authority to waive a condition that such claims must be presented within sixty days. (S. C.) *Hays v. Western Union Tel. Co.*, 731.

4. TELEGRAPH COMPANY—Time to Present Claim—Waiver. If a telegraph company, long after receiving a verbal claim for damages and eight or ten days after receiving such claim in writing, seeks further information as to the merits of the claim, it thereby waives its right to rely on a stipulation that claims must be presented in writing and within a specified time. (S. C.) *Hays v. Western Union Tel. Co.*, 731.

See Electricity.

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Telegraphs and Telephones, lines and poles of, when constitute additional servitudes, 260-264.

TENANCY IN COMMON.

1. COTENANCY—Grant of Right of Way by One Tenant.—If one tenant in common grants to a telegraph company a right of way over the common property, his cotenant cannot maintain trespass against the company for the construction of its line, unless it commits a trespass by doing something not properly incident to the exercise of the right granted, or in injuriously exercising the right in a negligent or wanton manner. His remedy is under the condemnation statutes. (S. C.) *Granger v. Postal Tel. Co.*, 750.

2. COTENANTS—Who are—Purchaser at Judicial Sale.—Where the undivided interest of one cotenant is sold under execution, the purchaser becomes a cotenant with the other tenant in common. (Iowa) *Rippe v. Badger*, 336.

3. COTENANTS—Contribution.—If One Cotenant Pays Off a lien on the common property, or pays more than his share thereof, or if he pays more than his share of the purchase price, he is entitled to contribution from his cotenants for their proportion, and has a lien on the property to secure the payment thereof. (Iowa) *Rippe v. Badger*, 336.

4. COTENANTS—Contribution Against Execution Purchaser.—A tenant in common in possession of the property who pays off a mortgage thereon may enforce contribution against an execution purchaser of his cotenant's interest who is chargeable with notice of such payment. (Iowa) *Rippe v. Badger*, 336.

5. COTENANTS—Contribution Against Execution Purchaser.—A tenant in common who has paid off a mortgage on the property is not bound to attend an execution sale of his cotenant's interest in the property and notify prospective purchasers of his right to contribution, in order to preserve such right as against them. (Iowa) *Rippe v. Badger*, 336.

6. COTENANTS—Contribution for Improvements.—A cotenant who is a disseisor is not entitled to contribution for improvements. (Iowa) *Rippe v. Badger*, 336.

7. COTENANTS—Rents.—A Cotenant Who is a Disseisor is chargeable with the rental value of his co-owner's share of the property, whether the rent is actually collected by him or not. (Iowa) *Rippe v. Badger*, 336.

TIMBER.

See Estovers,

TIMBER CULTURE LAND.

See Public Lands.

TORTS.

See Negligence.

TRADE NAMES.

TRADE NAMES—Injunction Against Use of.—If in organizing a corporation a trade name is chosen for and adopted by it, similar to one adopted by another and older corporation or copartnership, the use of such name may be enjoined by the latter if misleading and calculated to injure its business, irrespective of the good faith or intent to mislead the public, in adopting such trade name. (Minn.) *Nesne v. Sundet*, 439.

TRADES UNION.

See Injunctions, 4

TRIAL.

TRIAL—Instructions.—A correct instruction given by the court, but not previously given to the jury, may be read to it, by plaintiff's counsel during the closing argument over the objection of defendant's counsel. (Va.) *Lane Brothers & Co. v. Bauserman*, 872.

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See Carriers, 1, 2.

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TRUSTS.**Parol Trusts.**

1. **DEEDS—Parol Trusts—Evidence.**—A trust may be impressed upon property held under a deed absolute upon its face, by parol evidence of an agreement made at the time that the deed was executed, that the property should be held and impressed with such

trust in favor of a third person, not mentioned in the deed. (Tenn.) *Mee v. Mee*, 865.

2. **DEEDS—Parol Trusts—Evidence.**—If a deed absolute on its face, by its terms confers upon the grantee discretion to dispose of the land free from any trust, evidence is not admissible to establish a trust by showing a parol agreement to hold the land for that purpose. (Tenn.) *Mee v. Mee*, 865.

3. **DEEDS—Parol Trusts—Evidence.**—If a deed, absolute on its face, confers on the grantee discretion to dispose of land as he pleases, parol evidence is inadmissible to establish a mandatory trust agreed upon at the time of the execution of the deed, and thus contradict the terms of the deed. (Tenn.) *Mee v. Mee*, 865.

Resulting Trusts.

4. **RESULTING TRUSTS.**—A Trust Resulted at the Common Law when one person paid purchase money for lands, and the conveyance was taken to another, but, under the statute of New York, no trust results under such circumstances, except when the grantee in such conveyance takes it in his own name without the knowledge of the person paying the consideration, or when such grantee, in violation of some trust, purchases land with moneys belonging to another person. (N. Y.) *Leary v. Corvin*, 542.

5. **A RESULTING TRUST** does not Arise in favor of a person furnishing moneys used in the purchase of lands, a conveyance to which is taken in the name of another, unless the former furnishes the whole consideration or some aliquot part thereof, or for the value of some particular estate in the premises. (N. Y.) *Leary v. Corvin*, 542.

6. **RESULTING TRUSTS.**—The General Contribution of a Sum of Money Toward the Purchase of Land is not sufficient to create a resulting trust, where the conveyance is taken in the name of another. (N. Y.) *Leary v. Corvin*, 542.

7. **A RESULTING TRUST** cannot Arise in favor of a daughter who furnishes money to her father, to be by him employed in acquiring premises to be used as a home during his life, and, upon his death, to go to such daughter, when no particular piece of property was in view when the money was furnished, and the amount when finally used did not constitute any aliquot part of the purchase price of the property. (N. Y.) *Leary v. Corvin*, 542.

Precatory Trusts.

8. **TRUSTS, PRECATORY, When not Created by a Will.**—If a will purports to devise all the testator's property to his widow, to have and to hold to her and her heirs and assigns forever, but states that it is his will and desire that she shall pay the sum of three hundred dollars a year to his sister in law, Nellie Post, no trust or power in trust is created in her favor thereby. (N. Y.) *Post v. Moore*, 495.

Trustee ex Maleficio.

9. **TRUSTS—Failure to Perform Promise—Trustee ex Maleficio.**—Failure to perform a verbal promise made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that he will dispose of her estate as she desires, cannot make him, in case of an intestacy, a trustee, ex maleficio as to the property inherited by him, in the absence of actual fraud. (Ga.) *Cassels v. Finn*, 91.

10. **WILLS—Trustee ex Maleficio.**—If a wife induces her husband to convey to her by will all of his real and personal property, upon the express promise that she in turn will convey the same property by will to designated relatives, upon default upon her part to carry out the agreement she takes the property as trustee ex maleficio for the benefit of such designated relatives. (Minn.) *Laird v. Vila*, 420.

See Charities.

TRUSTS AND MONOPOLIES.

See Monopolies and Combinations.

VENDOR AND VENDEE.

Options.

1. **OPTIONS—Consideration—Revocation.**—An option to purchase land given without consideration may be withdrawn at any time before acceptance upon giving notice to the other party thereto, but an option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired, and if such consideration is not paid at the date of the option, but at a later date and during the life of the contract, it may be specifically enforced. (Va.) *Cummins v. Beavers*, 881.

2. **OPTIONS—Revocation—Consideration.**—A written option to purchase land extended by parol without any new consideration may be revoked at any time before acceptance. (Va.) *Cummins v. Beavers*, 881.

3. **OPTIONS—Fraud.**—The mere fact that an option to purchase land is taken for the purpose of speculation does not constitute fraud or unfair dealing. (Va.) *Cummins v. Beavers*, 881.

4. **OPTIONS.—Specific Performance** of an option for the sale of land may be enforced in equity against the person signing it, although it is not signed by the other party. (Va.) *Cummins v. Beavers*, 881.

Contract of Sale.

5. **VENDOR AND PURCHASER—Notice of Agreement to Sell.** A person who takes a conveyance of the legal title to land, with knowledge that his grantor has agreed to sell it to another, holds it subject to the equitable estate already vested in such intending purchaser. (Va.) *Cummins v. Beavers*, 881.

6. **VENDOR AND PURCHASER.—An Agreement to Convey Real Estate Calls for a Conveyance of the Entire Estate** in the lands sold by a good and sufficient deed. (Wis.) *Arentsen v. Moreland*, 951.

7. **VENDOR AND PURCHASER—Contract of Sale, When Includes All Timber on the Land.**—An option to purchase all lands controlled by the vendor belonging to the N. W. L. Company includes both the land and the timber growing thereon, though the vendor had a right under his contract with such company to the timber only, if he had under the same contract the option to purchase the complete title under the terms therein specified. (Wis.) *Arentsen v. Moreland*, 951.

Damages for Failure to Convey.

8. **VENDOR AND PURCHASER, Damages for Failure to Convey.** A vendor who agrees to convey lands which he knows at the time

he had himself previously conveyed to another, or to which he has no title, is answerable in damages to the vendee for the loss of his bargain. (Wis.) *Arentsen v. Moreland*, 951.

9. VENDOR AND PURCHASER, Damages for Failure to Convey When Purchaser Knew the Vendor had No Title.—If a person contracts to sell and convey land to which both he and the purchaser knew he had no title, the latter may, nevertheless, on the breach of the contract, recover for the loss of his bargain. (Wis.) *Arentsen v. Moreland*, 951.

Bona Fide Purchaser.

10. TRUST DEEDS—Fraud—Bona Fide Purchaser.—A purchaser of land after a trust deed thereon has been released without actual knowledge of such release through fraud or notice of any fact which would put him on inquiry, is not chargeable with such fraud, and if such release is afterward set aside without making him a party, he is not affected thereby. (Mo.) *Bristow v. Thackston*, 472.

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WAGERS.

See Gaming.

WATERS AND WATERCOURSES.

WATERCOURSES—Pollution by City.—Where a stream has been used as an open sewer for more than twenty-one years by a city, and the polluted portion of the stream is entirely within the limits of the city, a riparian manufacturer therein who has contributed to and acquiesced in such use cannot be heard to complain of the pollution or of its increase. (Ohio St.) Cleveland v. Standard Bag etc. Co., 613.

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WILLS.

Burial Lot.

1. WILLS.—A Burial Lot, in which the previous wives and a child of the testator are interred, does not pass under a general residuary devise to his widow, as against his children. (B. L.) Waldron, Petitioner, 688.

Contract to Make Will.

2. WILLS—Contract to Make—Specific Performance.—An agreement by a person to devise and bequeath real and personal property to minor relatives in consideration that the beneficiaries shall assume a peculiar and domestic relation to the promisor and render him services of such character as to make it impossible to estimate their value by any pecuniary standard is valid, and if executed on the part of the promisee and beneficiaries, specific performance of the contract will be enforced. (Minn.) Laird v. Vila, 420.

3. WILLS—Contract to Make—Proof.—A person may by contract obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate, but the evidence to sustain such an agreement must in all particulars be clear, positive and convincing. (Minn.) Laird v. Vila, 420.

Execution of Will—Subscribing at End.

4. WILLS—Statutory Requirements must be Complied with.—The right to make a testamentary disposition of one's property is

purely of statutory creation, and is available only on compliance with the requirements of the statute. The mode prescribed is the measure for the exercise of the right, and an heir can be deprived of his inheritance only by compliance with this mode. (Cal.) Estate of Seaman, 53.

5. **WILLS, Execution of, Intention of the Testator.**—For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it is entitled to no consideration. For that purpose the courts can consider only the purpose of the legislature as expressed in the language of the statute, and whether the will, as presented, shows a compliance with the statute. (Cal.) Estate of Seaman, 53.

6. **WILLS.**—The Provision that a Will must be Subscribed at the End Thereof Requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. (Cal.) Estate of Seaman, 53.

7. **WILLS.**—The Requirement that the Testator's Name Shall be Subscribed at the End of a Will is not Satisfied by having that name written at any place after the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will. His name need not be written in immediate juxtaposition with the concluding words of the instrument, but it must be so near thereto as to afford a reasonable inference that he thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purpose. (Cal.) Estate of Seaman, 53.

8. **WILLS.**—The Purpose of a Statute in Requiring the Testator's Signature to be Subscribed at the End of a Will is not only that it may thereby appear on the face of the instrument that the testamentary purpose therein expressed is completed, but also to prevent any opportunity for fraud or interpolations between the written matter and the signature. (Cal.) Estate of Seaman, 53.

9. **WILLS, Failure to Subscribe at the End.**—Absence of Fraud. Where the subscription of a testator to his will is not at its end, it is not material that there is no fraud shown or charged. (Cal.) Estate of Seaman, 53.

10. **WILLS, What not Subscribed by Testator at the End.**—A document purporting to be a will written upon a printed blank of four pages having an unfilled attestation clause on the third page and of which the fourth page is only a blank space for the indorsement when filed, and which is signed by the testator's name, and that of two witnesses beneath the scrivener's title and blank form for dating and filing, is not subscribed at the end, and cannot be admitted to probate under a statute requiring every will, other than nuncupative or holographic, to be subscribed at the end thereof by the testator, in the presence of two attesting witnesses, each of whom must, in his presence and at his request, sign his name as a witness at the end of a will. (Cal.) Estate of Seaman, 53.

Extrinsic Evidence.

11. **WILLS, Extrinsic Evidence of Intention to Execute.**—Whether a testator intended to execute a will in conformity with the requirements of the statute cannot be shown by parol or extrinsic evidence. If he subscribed at a place which, as a matter of law, is not at the end of a will, such evidence is not admissible to prove that he intended to subscribe it at the end. (Cal.) Estate of Seaman, 53.

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WITNESSES.

1. EVIDENCE—Leading Questions.—As a general rule, the asking of leading questions cannot be assigned as error because the circumstances under which they may be asked is in the discretion of the trial court. (Va.) *Lane Brothers & Co. v. Banseman*, 872.

2. WITNESSES—Wife Against Husband.—A statute forbidding a wife to be a witness against her husband without his consent except when he is prosecuted for the commission of a crime against her, limits her right to testify against him in a criminal proceeding without his consent, to crimes involving personal violence by him against her, and does not authorize her to testify against him, over his objection, in a prosecution for incest committed by him upon a third person. (S. Dak.) *State v. Burt*, 759.

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